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**FREEDOM OF ARTISTIC EXPRESSION UNDER ARTICLE 10 OF THE  
EUROPEAN CONVENTION ON HUMAN RIGHTS**

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**Ph. D.**  
**The University of Edinburgh**  
**2016**

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## DECLARATION

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I confirm that the thesis contained herein has been composed by myself, is my own work, has not been submitted for any other degree or professional qualification and that any included publications are my own work, except where they are indicated throughout the thesis and summarised and clearly identified on the declarations page of the thesis.

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Iona Street, Edinburgh

15<sup>th</sup> December 2016

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## THESIS ABSTRACT / LAY SUMMARY

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Under the auspices of Article 10 of the European Convention on Human Rights the right to freedom of expression is said to be held by everyone and to include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority, subject to the limitation clauses outlined in Article 10(2). Whilst the text of Article 10 therefore makes no explicit reference to specifically *artistic* expression, the European Court of Human Rights has, in its interpretation of ‘information and ideas’, nevertheless accepted that artistic expression does indeed fall within the ambit of Article 10’s protection of freedom of expression.

However, despite the Court recognising artistic expression as a form of expression within the framework of Article 10, conclusions reached in the early case law concerning the issue of controversial artworks would appear to suggest the judicial creation of an implicit hierarchy of expression under which artistic expression is seen to enjoy a relatively low level of protection. Given the non-differentiated articulation of the right to freedom of expression enounced in the text of Article 10, the creation of such a hierarchy of expression is therefore a cause for doctrinal concern.

In seeking to assess this misnomer the thesis’ analysis of the treatment of artistic expression under Article 10 of the European Convention on Human Rights may be distilled in to two component parts. Firstly, a theoretical basis will be established from which artistic expression may be located within the context of the discourse pertaining to freedom of expression more generally. Having confirmed that, whilst of a distinctive, *sui generis* nature, artistic expression may indeed constitute ‘expression’ for the purposes of freedom of expression doctrine the second part of the thesis will examine the particular question of artistic expression’s treatment under Article 10 of the European Convention on Human Rights.

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*It is not surprising...that art should be the enemy marked out by every form of oppression. It is not surprising that artists and intellectuals should have been the first victims of modern tyrannies, whether of the Left or the Right. Tyrants know there is in the work of art an emancipatory force, which is mysterious only to those who do not revere it.*

Albert Camus,  
1957 Nobel Prize for Literature



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## INTRODUCTION

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### a) Background to the thesis

#### (i) ***An introduction to the juxtaposing case law of the European Court of Human Rights: the emergence of this thesis' premise***

The genesis of this thesis, and my interest in the law concerning freedom of artistic expression, may be traced back to an international human rights law seminar on the topic of freedom of expression that I attended whilst an undergraduate at the University of Sheffield. As part of the background reading for the seminar we were required to read the seminal European Court of Human Rights case of *Handyside v. UK* as well as, amongst others, *Otto-Preminger-Institut v. Austria*. Upon reading these cases a certain perplexity began to emerge. On the one hand, the Court's *obiter* in *Handyside* was clear in its insistence that the right to freedom of expression applied to expression that 'offend[s], shock[s] or disturb[s] the State or any sector of its population'. Yet, on the other hand, in the case of *Otto-Preminger-Institut*, the State's confiscation of a film due to be shown at an art film house in the Tyrol region of Austria on the basis that it offended the religious sensitivities of the local community was deemed to *not* violate the freedom of expression guarantees under Article 10 of the European Convention on Human Rights. It was tentatively noted, therefore, that there was something of a divide between the words employed by the Court and its subsequent (in)action in particular instances concerning controversial or offensive expression.

My thoughts on the apparent discrepancy between the rhetoric of *Handyside* and the European Court of Human Rights' subsequent jurisprudence resulting in the *Otto-Preminger-Intsitut* judgment lay dormant for a couple of years before resurfacing again whilst studying towards an L.L.M. in International Law at the University of Edinburgh. During the process of researching cases for an essay discussing the extent to which the European Convention on Human Rights contains an implicit right to not be offended, my attention continually returned to a selection of particularly apt Article 10 cases in which, as was the case with *Otto-Preminger-Institut*, restrictions on controversial or offensive expression were held to not violate Article 10. In particular, and in addition to *Handyside*

and *Otto-Preminger-Institut*, the basis of the resulting essay was centred on an analysis of *Wingrove v. UK* (which concerned the refusal of the British Board of Film Certification to award a short film depicting a nun engaging in suggestive sexual activities with the figure of Christ with the required certificate for public distribution) and *Müller v. Switzerland* (in which paintings depicting various sexual scenes were confiscated by the authorities).

Thus, in all of the above-mentioned cases in which controversial expression was restricted by the State, the European Court of Human Rights found that there had been no violation of Article 10 notwithstanding the *Handyside* dictum in which it was stipulated that the right to freedom of expression, elicited under Article 10, applies as equally to offensive, shocking or disturbing expression as it does to expression that is regarded as ‘inoffensive or as a matter of indifference.’ Accordingly, whilst the essay’s inquiry in to the purported implicit right to not be offended centred on this seeming disparity between the *Handyside* dictum and the Court’s resulting case law concerning offensive expression, little was said of the particular form in which the expression in *Müller*, *Otto-Preminger-Institut* and *Wingrove* was manifested. Nevertheless, it seemed somewhat curious that the triumvirate of cases on which the essay rested should each concern *artistic* expression; that is to say that the expression was made through the artistic media of, namely, film (*Otto-Preminger-Institut*, *Wingrove*) and painting (*Müller*). The resulting thesis and its investigation of the European Court of Human Rights’ treatment of artistic expression under Article 10 of the European Convention on Human Rights is the result of this initial observation.

## **(ii) The categorisation of expression: creating a hierarchy of expression**

That there is, indeed, significance in the observation that the cases of *Müller*, *Otto-Preminger-Institut* and *Wingrove*, in which no violation of Article 10 was found, concerned artistic expression has been commented upon in Professor Harris *et al*’s leading textbook on the European Convention on Human Rights wherein it has been suggested that the Court has proffered varying degrees of protection under Article 10 depending on the type and nature of expression at issue.<sup>1</sup> Accordingly, the textbook’s analysis of the European Court of Human Rights’ Article 10 jurisprudence is sub-divided in to three predominant categories of expression: political expression (including civil, or public interest,

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<sup>1</sup> Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights*, 2<sup>nd</sup> ed. p. 455

expression), artistic expression and commercial expression;<sup>2</sup> with each category positioned on a sliding scale of judicial protection.<sup>3</sup> Thus, an implicit hierarchy of expression has been seen to have transpired under the Court's application of Article 10, with political expression at the apex of the Court's protection, artistic expression enjoying an intermediate degree of protection and commercial expression enjoying the lowest level of protection under Article 10.

However, such a hierarchy of expression, to the extent that it does indeed exist, is curious in itself. Turning to the text of Article 10 we find that 'expression' is defined in general, non-differentiated terms, with no specific reference being made to the various forms – political, artistic or commercial, for instance – that expression may take. Accordingly, in outlining the right to freedom of expression, the text of Article 10(1) of the European Convention on Human Rights reads:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart *information and ideas* without interference by public authority and regardless of frontiers.<sup>4</sup>

Thus, in addition to the discrepancy between the assurances made in *Handyside* and the European Court of Human Rights' subsequent case law a further discrepancy exists within the Court's application of Article 10 itself. In essence, therefore, there is a supposed differentiation of treatment of the various forms of expression that has been seen to have emerged from a non-differentiated human right according to which 'expression' is defined with particular emphasis on the communication of *information and ideas*.

### **(iii) Initial thoughts on the thesis' premise**

Given the apparent discrepancies outlined above with regards to the case law and categorisation of expression, in preparing to embark upon the research and writing of this thesis a working premise began to emerge according to which it was supposed that there might be some underlying correlation between the inherent nature of artistic expression and its relatively low level of protection under Article 10 of the European Convention on

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<sup>2</sup> See Harris, O'Boyle & Warbrick (n 1) at 455-465. Whilst the authors include civil/public interest expression as a distinct category, for the purposes of this thesis such expression will be considered to be subsumed within political expression. For more, see Chapter Three *infra*.

<sup>3</sup> Harris, O'Boyle & Warbrick (n 1) at 455-465

<sup>4</sup> European Convention on Human Rights, Article 10(1) (emphasis added)

Human Rights. Put another way, it was posited that there might be some quality of art and artistic expression that contributed to the judicial undermining of artistic expression as a valued form of expression for the purposes of freedom of expression law. In part this supposition was based on the observation that, as Harris *et al* suggest, the European Court of Human Rights appears to be far more willing to find violations of Article 10 when the expression in question is of a political nature.<sup>5</sup> As such, an attempt by the State to restrict comments made in a newspaper would likely prompt the Court to find that a violation of Article 10 had occurred. Yet, in continuing on the theme of the offensiveness of expression, it is perfectly conceivable to suppose that political expression may be regarded as offensive; to put it crudely, a committed socialist may, one would suspect, take great offence at comments made in a conservative-leaning newspaper. Given the non-differentiated exposition of the right to freedom of expression in the text of Article 10 it therefore seemed, at the onset of this inquiry, somewhat incongruous to suppose that offense stemming from artistic expression may be subject to greater limitations than its political counterpart.

That the case law of the European Court of Human Rights would appear to indicate the creation of a hierarchy of expression detrimental to specifically artistic expression is therefore of profound interest especially when considered in light of the *Handyside* dictum. Whilst my background does not lie in the philosophy of art or art theory, from the perspective of a layman with an interest in the arts, it seemed to me that a fundamental *raison d'être* of art and artistic expression is precisely to *challenge* norms and 'ask' the difficult questions such that the noted applicability of Article 10 to expression that offends, shocks or disturbs in *Handyside* would appear, on its face, to offer a sympathetic foundation aligning with the very essence of artistic expression.

This underlying notion of artistic expression's essence of challenging norms can be seen from two perspectives. Firstly, the development of various art movements would itself indicate a perpetual challenging of the prevailing status quo within the artistic realm, with each movement offering some sense of departure from the last. For instance, the abstract works of Jackson Pollock can be seen as a progression from Picasso's cubism which, in turn, proffered a development on an impressionist movement that had itself diverged from the realism movement. Secondly, and of greater significance for the purposes of this thesis, an underlying value of art lies in its distinctive capacity to challenge our previously held

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<sup>5</sup> Harris, O'Boyle & Warbrick (n 1) at 455: "It is firmly established that restrictions on political discussion call for stringent review." (citations omitted)

convictions. For performance artist Karen Finley – who was herself the subject of an infamous First Amendment case concerning freedom of artistic expression<sup>6</sup> – the role of the artist is to, “interpret not just the aesthetics of life, but actually to represent or create meaning.”<sup>7</sup> There exists, as such, a symbiotic relationship between the artist and society through which the artist seeks to both reflect, as well as shape, the society in which they exist.

With regards to the conveying of information and ideas one can, therefore, with relative conceptual ease, consider artistic expression to be expression, for purposes of freedom of expression law. Yet there remains something curiously distinctive about the precise nature in which artistic expression conveys its ideas. As the artist Keith Haring posited, “[i]f I could say it in words there would be no reason to paint.” Moreover, for the French artist Georges Braque, “[a]rt is made to disturb. Science reassures. There is only one valuable thing in art: the thing you cannot explain.” Taken together, then, the underlying assumption informing the development of this thesis’s inquiry was that, whilst artistic expression could be considered as expression for the purposes of freedom of expression doctrine, there was something unique about the way in which such expression is made that might account for the discrepancy between the European Court of Human Rights’ dictum in *Handyside* and the early case law of *Müller*, *Otto-Preminger-Institut* and *Wingrove*.

#### **(iv) The importance of protecting art: From history to the present day**

Turning to history, art has been seen to enjoy a precarious position in totalitarian societies. The notorious mass book burnings as well as the ‘Degenerate Art’ exhibition of 1937, in which examples of art considered as not conforming with the Nazi Party ideology were displayed and disparaged, proffered something of a death knell for freedom of artistic expression in Germany. Indeed, whilst preparing works for exhibitions artists could expect unannounced visits from ‘aesthetic officials’ who would proffer ‘advice’ on how the artist ought best proceed. By way of example, during one such spot check, the aesthetic official stated that the work in question was, “[m]uch too gloomy; let’s have a little more joy in your composition. People in Germany no longer have such careworn faces”<sup>8</sup>; as the historian Richard Grunberger has wryly commented: “[t]he two prerequisites for artistic

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<sup>6</sup> *National Endowment for the Arts v. Karen Finley et al*, 524 U.S. 569 (1998)

<sup>7</sup> Interview from the Los Angeles Times, available at: <http://www.latimes.com/books/jacketcopy/la-et-jc-karen-finley-banned-books-week-20150929-story.html> (accessed 14<sup>th</sup> December 2016)

<sup>8</sup> Grunberger, R. *A Social History of the Third Reich*, Penguin, 1974, p. 544

success in the Third Reich were meticulousness and receptiveness to official guidance.”<sup>9</sup> For those artists in Nazi Germany who proved unreceptive to the Nazi Party’s artistic guidance a range of measures could be imposed such as prohibiting the artist from teaching, exhibiting his works or even from engaging in the very act of painting itself. Indeed, to enforce the latter sanction, the State would go so far as to place lists of proscribed artists in paint shops thereby denying the artist from procuring the requisite materials for his endeavour whilst the Gestapo would conduct raids on proscribed artists’ residences ensuring that their paintbrushes remained dry.<sup>10</sup>

The plight of, particularly abstract and expressionist, art in Nazi Germany would appear to demonstrate a *prima facie* unease with which totalitarian regimes – in seeking to undermine individual freedom more generally – consider artistic freedom. Conversely, moreover, such nervousness might indeed suggest the totalitarian’s recognition of the power and social utility of art, a consideration that finds emphasis, in turn, in the efforts placed by such regimes in producing art that was considered to reinforce their underlying ideologies. As such, Greenberger has noted, those (competent) artists who complied with the Nazi regime’s requirements could prosper and achieve notoriety; the regime being more than keen to award a range of commissions, prizes and titles to those willing to produce works instilling the requisite patriotic fervour.<sup>11</sup>

Accordingly, the impact of the Nazi regime’s influence on art – by both proscribing degenerate art and actively promoting such art that was deemed to inspire Nazi ideology – is perhaps most profoundly seen by comparing two works by the sculptor Georg Kolbe. Produced in 1927, six years prior to Adolf Hitler’s ascension to Chancellor in 1933, *Der Einsame* (The Lonely One) depicts a solitary nude figure. With his head slumped slightly and his arms hanging limply by his side, the sculpture is suggestive of both timidity and introversion. The difference between *Der Einsame* and Kolbe’s 1934 sculpture entitled *Der junge Streiter* (The Young Warrior) is plain. The nude figure depicted in *Der junge Streiter* is more taut and muscular and his head is held high with an air of purpose and assuredness that is entirely absent from Kolbe’s earlier work. Whilst it is not the purpose of this thesis to suggest that there is a correlation between the proscription of art and the rise of totalitarianism the State’s tailoring of ‘acceptable’ art in the context of Nazi Germany

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<sup>9</sup> Grunberger (n 8) at 544

<sup>10</sup> Grunberger (n 8) at 544-545

<sup>11</sup> Grunberger (n 8) at 543

nevertheless provides an ample reminder in extremis of both the potential significance of art and artistic expression in society as well the fundamental need to encourage its protection.

During the course of researching and writing this thesis controversies surrounding artistic expression have never been far from the news headlines. In 2011, Chinese artist and human rights activist Ai Weiwei was detained by the Chinese authorities and his studio demolished. The following year saw members of Pussy Riot, a punk rock protest group, arrested in Russia following an impromptu performance of a song critical of Vladimir Putin in a Moscow cathedral. Also in 2012, religious groups in the Philippines attempted to ban the pop star Lady Gaga from performing in the country; her song *Judas* being denounced as blasphemous whilst *Born This Way* was condemned for its pro-homosexual connotations.<sup>12</sup> In 2013 Index on Censorship, a leading free speech advocacy group, held a conference entitled *Taking the offensive: Protecting artistic expression in the UK* in London during which the extent of self-censorship in the creative process and creeping legal restraints on artistic expression were but two of a range of issues tabled for discussion.<sup>13</sup> Since at least 2014, Islamic State have engaged in the destruction of a number of sites of archaeological and cultural significance throughout the Middle East bringing with it the loss of many irreplaceable examples of ancient art. Closer to home, 2014 also saw London Transport refuse to display Antony Micallef's work *Kill Your Idol* – in which Jesus Christ is depicted in front of a panel of judges reminiscent of television talent contests – on the walls of the London Underground alongside other contemporary depictions of the Passion of Christ.<sup>14</sup> Finally, in the opening days of 2015, discussions about the role of artistic expression and its appropriate delineations echoed throughout the world following an Al-Qaeda attack on the offices of Charlie Hebdo, a French satirical magazine, in which eleven people were murdered.

Whilst there has therefore been no shortage of inspiration to draw upon whilst writing this thesis there was one development in particular that was especially intriguing. In 2012 the

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<sup>12</sup> See <http://www.telegraph.co.uk/culture/music/music-news/9280733/Lady-Gaga-defies-censors-to-play-provocative-show-in-the-Philippines.html> (accessed 8th November 2015)

<sup>13</sup> The report of the conference can be found at: <https://www.indexoncensorship.org/wp-content/uploads/2013/05/taking-the-offensive.pdf> (accessed 12th November 2015)

<sup>14</sup> To see the artwork and for a general background, see Mark Brown, *Pop Idol painting of Jesus fails to get Transport for London's vote*, The Guardian, 28<sup>th</sup> March 2014 available online at <http://www.theguardian.com/artanddesign/2014/mar/28/pop-idol-painting-jesus-london-tube-anthony-micallef-kill-your-idol> (accessed 8th November 2015)

British Board of Film Certification approved *Visions of Ecstasy* for certification, thereby allowing the short film to be distributed to the public more than twenty years after rejecting the film from certification on the basis of its blasphemous content. The refusal of the British Board of Film Certification to grant the film with a certificate for distribution two decades previously had led, ultimately, to the European Court of Human Rights and the case of *Wingrove v. UK*, one of the triumvirate of cases to inform the basis of my Masters essay on the implicit right to not be offended under the European Convention on Human Rights and prompt my interest in the right to freedom of specifically artistic expression. With the abolition of the common law offence of blasphemy by the Criminal Justice and Immigration Act in 2008, the British Board of Film Certification considered there to be no continuing legal basis for the censoring of *Visions of Ecstasy*; its previous refusal being based, not on the sexual content of the film *per se*, but on the basis that the sexual content revolved around the sacred figures of St Theresa of Avila and Jesus Christ.<sup>15</sup> Accordingly, with the impact of the European Court of Human Rights' judgment in *Wingrove* firmly etched in to the consciousness of European freedom of expression discourse such a significant development on the domestic front further emphasised the importance of analysing the development of the Strasbourg Court's doctrinal treatment of artistic expression that lies at the heart of this thesis.

## **b) The underlying aims of the thesis' inquiry**

When compared to the volume of ink that has been spilled over the topic of freedom of expression more generally the treatment of specifically *artistic* expression under Article 10 of the European Convention has, with a few notable exceptions, received relatively scant attention in the academic literature.<sup>16</sup> A fundamental purpose of this thesis is, therefore, to redress this imbalance and contribute to the wider discourse concerning the right to freedom of expression under Article 10 by narrowing the focus to the underrepresented, particular issue of artistic expression. Thus, whilst the emphasis of this thesis lies in an investigation of the European Court of Human Rights' treatment of art and artistic expression, it is hoped that the conclusions reached will resonate more generally than the narrow parameters of the thesis' principal inquiry. For instance, by analysing and critiquing the rationale employed in the Court's determination of cases concerning the particular issue of artistic

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<sup>15</sup> See <http://www.bbfc.co.uk/case-studies/visions-ecstasy> (accessed 12th November 2015)

<sup>16</sup> For the exception proving the rule, see Kearns, P. *Freedom of Artistic Expression: Essays on culture and legal censure*, Hart Publishing, 2013 in which over a decade's worth of research and comment on the specific issue of artistic expression has been collated.



expression, wider conclusions may be drawn with regards to the Court's understanding of freedom of expression more generally. Accordingly, the extent to which artistic is protected and the doctrinal justifications proffered *for* its protection will be seen to shed light on the meaning, scope and value of freedom of expression under Article 10 more generally. Thus, by focusing the lens of inquiry on to the particular question of freedom of *artistic* expression it is hoped, therefore, that this thesis will contribute to a more holistic and nuanced appreciation of the right to freedom of expression under Article 10 of the European Convention on Human Rights.

The relative silence of academic comment on the topic of artistic expression under Article 10 of the European Convention on Human Rights may, in part, be explained by the paucity of case law to have been decided by the Strasbourg Court. Nevertheless, whilst still relatively few in number, the case law concerning artistic expression has expanded since the *Müller/Otto-Preminger-Institut/Wingrove* triumvirate of cases, producing with it developments in the Court's jurisprudence. Given that the case law has developed over the course of nearly thirty years since 1988 and the case of *Müller* – in which the Court explicitly recognised that artistic expression indeed fell within the protective ambit of Article 10 for the first time – the primary purpose of this thesis, in its contribution to the freedom of expression discourse, is to examine the extent to which there still exists a hierarchy of expression in the European Court of Human Rights' jurisprudence according to which artistic expression is seen to enjoy a relatively low degree of protection. Moreover, and to the extent that there remains in its judgments a hierarchy of expression, an analysis will emerge within which the European Court of Human Rights' treatment of artistic expression will be critiqued.

### **c) Thesis outline**

In order to successfully analyse the European Court of Human Rights' case law concerning the freedom of artistic expression the opening chapters of this thesis will seek to contextualise, from a theoretical perspective, artistic expression within the broader confines of the freedom of expression discourse. Given the non-differentiated definition of 'expression' within Article 10 of the European Convention on Human Rights, according to which the right to freedom of expression is enunciated with a particular emphasis on the conveyance of *information* and *ideas*, contextualising the concept of artistic expression within the broader freedom of expression paradigm is of fundamental necessity for the

development of the thesis. Accordingly, in order to establish that artistic expression is indeed ‘expression’ for the purposes of Article 10 it plainly needs to be established that artistic expression has the capacity to convey information and ideas.

To this end, Chapter One begins by providing an overview of the key strands to have emerged from philosophical thought concerning the right to freedom of expression. Starting with an exposition of Mill’s utilitarian position concerning the importance of freedom of expression in the development of collective thought and truth, Chapter One then proceeds to critique Scanlon’s autonomy argument for the protection of freedom of expression as well as the self-fulfilment rationale before turning its attention to the Meiklejohnian argument from democracy in which the importance of freedom of expression is seen to lie in allowing the citizenry to self-govern effectively.

Having established the underlying contours of freedom of expression’s philosophical and theoretical thought, Chapter Two continues the process of contextualising artistic expression within the freedom of expression paradigm by proffering an overview of the theory and philosophy of art. Whilst this thesis’ primary concern lies in human rights law – and as such does not intend to offer any significant contribution to the realm of art theory – it is, nonetheless, essential to incorporate a general appreciation of a selection of prominent schools of thought concerning the theory and philosophy of art in order to provide a framework within which to analyse the European Court of Human Rights’ jurisprudence on the question of freedom of artistic expression. As such, whilst the discussion in Chapter Two focuses quite specifically on the development of thought regarding the theories of art that might be referred to, generally, as ‘fine art’ the implications to be drawn as to art’s underlying value and distinctive mode of operation, are more far-reaching and may be seen to apply to the range of artistic expression that has been heard before the European Court of Human Rights.

Of fundamental import to the development of this thesis is the recognition that artistic expression is capable of conveying information or ideas and, as such contributing to some form of public discourse yet, as the overview in Chapter Two demonstrates, that art has such a capacity is not immediately clear. For instance, the formalist school would submit that the value of art lies within the formal qualities of a given work such as the artist’s use of colours and shapes. More encouragingly for the purpose of converging the theories of art and freedom of expression, other theories of art – emanating, in particular, from

adherents of the expressivist and aesthetic cognitivist schools – would submit that the value of art does indeed lie in its communicative qualities. Moreover, and of particular significance, it will transpire that artistic expression is seen to communicate in ways distinct to other modes of expression, suggesting that artistic expression occupies a curious positioning within the freedom of expression paradigm.

Having established a theoretical framework within which it is confirmed that artistic expression is indeed expression for the purposes of freedom of expression doctrine in general and Article 10 in particular, the discussion in Chapter Three lies in the extrapolation of the European Court of Human Rights' approach to categorising expression. Chapter Three opens with an assessment of a theoretical basis according to which the categorisation of expression, and subsequent attributing of varying degrees of protection, may be rationalised according to the distinction made by Schauer's between the coverage of the right to freedom of expression and the ensuing protection proffered. As such, emphasis will be placed on the extent to which a given category of expression is seen to promote the underlying values of Article 10. The second part of Chapter Three proceeds to analyse the European Court of Human Rights' approach to the categorisation of expression in light of Schauer's observations. As such, the foundation will be set from which to note that, through a lack of scrutiny and judicial oversight, the Court has failed to appreciate the unique ways in which artistic expression can contribute to the core values of Article 10.

The culmination of Chapter Four's analysis of the European Court of Human Rights' treatment of specifically artistic expression seeks to incorporate the various strands of inquiry to have emerged in the previous chapters. By analysing the more recent developments in the Court's jurisprudence concerning the freedom of artistic expression since the early triumvirate of cases relating to *Müller*, *Otto-Preminger-Institut* and *Wingrove*, a critique will emerge in which the success with which the Court has recognised the particular challenges relating to artistic expression as a form of expression within Article 10 will be addressed.

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## **CHAPTER ONE**

### **FREEDOM OF EXPRESSION: A THEORETICAL AND PHILOSOPHICAL OVERVIEW**

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#### **1.1 INTRODUCTION**

It has been said that artistic freedom is, “the Cinderella of liberties, seldom in the spotlight, and never in the limelight.”<sup>17</sup> Before seeking to address this discrepancy and allowing artistic expression to make its way to the centre stage of this thesis it is necessary that it wait a while longer in the wings whilst we first survey the general nexus of thought concerning the philosophy of freedom of expression more generally. The opening half of this thesis is, as such, of a largely theoretical nature; its purport, in essence, being to both identify and rationalise artistic expression’s location within the broader discourse concerning the right to freedom of expression. Only from an understanding of the abstract can one fully appreciate and more comprehensively analyse the judicial treatment of artistic expression in actual, concrete cases; an analysis of which will follow in Chapter Four of this thesis.

As such, by sketching an outline of the literature and underlying thought concerning the general theories of the right to freedom of expression, the opening chapter of this thesis will provide the contextual foundation from which the ensuing discussion in Chapter Two – regarding the theories of art – will seek to connect the dots and, in so doing, illuminate the intricate and, at times, inherently fraught nature of artistic expression as a *sui generis* mode of expression within the underlying principles of freedom of expression more generally. Thus, having initially located the theoretical basis for artistic expression’s inclusion within the broader paradigm of freedom of expression in the opening chapters of this thesis, the second half of will progress on to the more practical, empirical question of the success with which the European Court of Human Rights has recognised the doctrinal dexterity required when considering questions of artistic expression and the extent to which artistic expression has, accordingly, been protected.

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<sup>17</sup> Kearns (n 16) at 150

Turning our minds back to the present chapter and the prevailing theories relating to the right to freedom of expression, it is fundamentally important to note, from the outset, the generally accepted position, as held in academic thought as well as judicial case law, that freedom of expression is not an absolute right. Indeed, as we shall see in Chapters Three and Four of this thesis, the overwhelming majority of case law concerning Article 10 concerns the interpretation and application of Article 10(2)'s limitation clauses and their provision for the legal restriction of freedom of expression. Thus, whilst there is a broad consensus that the right to freedom of expression ought not to be equated with a right to express whatever one wants, whenever one wishes, the consensus in judicial and academic opinion becomes divided when it comes to the drawing of lines and delineating what freedom of expression, in practice, actually entails.

In this regard, whilst the question of the right's precise extent and coverage will be more extensively addressed in Chapter 3's discussion concerning the categorisation of expression under Article 10 of the European Convention on Human Rights, by first examining the three principal schools of thought concerning freedom of expression – namely, the arguments from truth, democracy, and self-fulfilment/autonomy – key themes will begin to emerge from which we will, in Chapter Two, be able to locate more precisely artistic expression's theoretical foundation within the freedom of expression paradigm. Indeed, the importance of identifying the value(s) that freedom of expression seeks to promote cannot be overstated. For, as Redish proclaims, “the answer we give to the question what value does free speech serve may well determine the extent of constitutional protection to be given to such forms of expression as [inter alia] literature [and] art.”<sup>18</sup> Accordingly, by first tracing the contours of the right to freedom of expression *vis-à-vis* the identification of the broad values held by each school of thought to justify the significance of the right in general, not only we will begin to see a bird's eye view of the landscape of freedom of expression, but the location, too, of artistic expression therein.

## **1.2 THE ARGUMENT FROM TRUTH**

### **1.2.1 An exposition of John Stuart Mill's 'On Liberty'**

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<sup>18</sup> Redish, M. *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1981-1982) at 591

First published in 1859, John Stuart Mill's *On Liberty* sets out what has proved to be one of the most lyrical and enduring defences of individual liberty in general and freedom of expression in particular. Indeed, the collection of essays has been described as “an icon of the liberal tradition”<sup>19</sup>, making it a useful starting point in our examination of the philosophical foundations of the right to freedom of expression. No treatment of the subject of freedom of expression would be complete without reference to this seminal work yet, far from being consigned to the annals of historic thought, the full implications of Mill's defence of freedom of expression remain of academic and jurisprudential interest to this day.<sup>20</sup> Moreover, the general framework provided by Mill may, it is suggested, proffer a useful basis from which to tentatively build the theoretical basis of artistic expression's utility and very existence within the freedom of expression paradigm.

Mill's defence of freedom of expression, contained in Chapter Two of *On Liberty*, is most commonly referred to as evincing an argument from truth. That is to say that unimpeded expression and discussion will, so it is hypothesised, most likely lead to a greater understanding or appreciation of truth. In support of this particular thesis Mill proffers three principal reasons setting out why discussion ought to be largely unimpeded so as to protect even apparently false or controversial expression. Firstly, according to Mill, one cannot be absolutely certain that the opinion that is sought to be suppressed is, in fact, false. To claim otherwise would be to assume our own infallibility, a position that Mill would not readily undertake.<sup>21</sup> Secondly, whilst the suppressed opinion may well be false, it is more likely than not to contain an element of truth. Moreover, since the prevailing opinion is likewise unlikely to contain the whole truth, it is only, so Mill considered, through the, “collision of adverse opinions that the remainder of the truth has any chance of being supplied.”<sup>22</sup> Thirdly, even on the basis that it could be assumed that the prevailing opinion contained

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<sup>19</sup> Schauer, F. *On The Relation Between Chapters One and Two of John Stuart Mill's 'On Liberty'*, 39 Capital University Law Review 571 (2011) at 571

<sup>20</sup> For contemporary academic discussion over the implications of the Millian perspective see, for instance, the debate between Schauer and Blasi in the 2011 volume of the Capital University Law Review at pages 571 and 535 respectively. With regards to the relevance of the Millian defence of freedom of expression in judicial thought, the distinction made by Mill between ‘discussion’ and ‘positive instigation’, outlined in section 1.2.3 below, may be employed in rationalising the development of the European Court of Human Rights’ jurisprudence regarding its freedom of (artistic) expression case law. The Court’s determination of the film in *Wingrove* as being ‘gratuitously offensive’ and therefore of no societal value may be broadly aligned with Mill’s ‘positive instigation’ whereas, the more recent cases of *Alinak and Karatas* – in which the artistic qualities of the works in question were given more credence – may be likened to Mill’s ‘discussion’.

<sup>21</sup> Mill, J. S. *On Liberty, Representative Government, and the Subjugation of Women: Three essays by John Stuart Mill*, Oxford University Press (1960) at 65

<sup>22</sup> Mill (n 21) 65

the whole truth; unless it is “vigorous and earnestly” contested it will become a form of dogma, based on prejudice rather than reason.<sup>23</sup> Given, as we shall see in further detail below with regards to the application of his rule-utilitarianism – according to which the greatest good is considered to be best achieved through the adoption of general, long-term rules or principles rather than through the determination of the utility of specific, individual acts<sup>24</sup> – the faith held by Mill in man being a progressive being, the potential stagnation of thought may be seen as being particularly anathema to Mill.

Accordingly, in order for art and artistic expression to be seen to fall within the scope of the Millian conception of freedom of expression it needs to be demonstrated that, as a *sui generis* mode of expression, it has the capacity to engage with and contribute to discourse and the ‘collision of adverse opinions’ such that it may, in some way, be seen to contribute to the revelation of truth and the prevention of public opinion becoming unquestioningly stagnant. Whilst Chapter Two’s assessment of the prevailing schools of thought with regards to art theory will demonstrate that artistic expression’s ability to contribute to public discourse is by no means uncontested, it will nevertheless be suggested that there remains ample scope – especially within the expressivist and aesthetic cognitivist schools of thought, with their assertion that art and artistic expression *is* capable of conveying either emotions or ideas<sup>25</sup> – to locate artistic expression within the framework of a Millian defence of freedom of expression. For, as a corollary to artistic expression’s capacity to convey emotions and ideas – and in addition to the challenging of artistic norms, as evinced by the development from realism to impressionism to cubism noted in the introduction to this thesis – comes a capacity to contribute, it is suggested, to the ‘collision of adverse opinions’ necessary to prevent the anathema of a stagnation of thought.

If we therefore accept, at this juncture, that artistic expression is indeed expression for the purposes of freedom of expression philosophical discourse – in as much as it is capable of communicating *something* – a *prima facie* reading of the Millian stance can be seen as proffering a particularly attractive framework from which to base artistic expression’s protection. With Mill’s assertion that the ‘collision of adverse opinions’ is required in order

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<sup>23</sup> Mill (n 21) at 65

<sup>24</sup> For a brief overview on the distinction between act- and rule-utilitarianism see, for instance, Harrison-Barbet, A. *Mastering Philosophy*, Palgrave, 2<sup>nd</sup> ed. p. 204. Accordingly, in contrast to the *act*-utilitarian, Mill’s philosophy is not grounded in the question of whether the specific expression ‘x’ is capable of contributing to the greatest good but, rather, in the assumption that free expression *in general* promotes that underlying goal of the greatest social utility.

<sup>25</sup> See sections 2.3 and 2.4 *infra*

to promote societal progression and avoid the stagnation of thought, the theoretical foundation for protecting controversial art might therefore be seen to lie in the very fact that it is deemed controversial.

### **1.2.2 The limitations of the Millian exposition of freedom of expression**

Based on essentially consequentialist reasoning, placing the ultimate value of an action on its perceived results and outcomes, the most enduring criticism of Mill's philosophical justification for freedom of expression is, perhaps, its substantial reliance on the existence of a causal relationship between discussion as the means and truth as the end.<sup>26</sup> Whilst a detailed examination of the extent to which such a correlation may be said to exist lies out with the scope of this thesis, for present purposes, and in terms of attempting to locate artistic expression within a broader context, it suffices to say that the Millian approach remains a strong defence for the promotion of freedom of (artistic) expression in as much as it encourages and supports that expression deemed controversial to the otherwise stagnant dogmatic position held by a given majority. Indeed, whilst Mill's thesis has great difficulty in fully explaining, as Barendt points out, exactly why unimpeded expression will *necessarily* lead to truth (or, for that matter, better individual or societal decisions), it nevertheless remains particularly applicable to the expression of beliefs concerning political, moral, aesthetic and social matters.<sup>27</sup>

Leaving questions of epistemology and the nature of truth and extent to which unimpeded expression is more or less likely to produce it to one side, however, a more profound criticism of Mill's *On Liberty* is that it is internally incoherent. In particular, it has been claimed that there is a degree of tension between his general theory of liberty encapsulated in the introductory chapter and the more specific defence of freedom of expression found in Chapter Two of *On Liberty*, especially with regards to the incorporation of purportedly harmful expression within Mill's overall thesis. By seeking to resolve these tensions not only will a more nuanced light be shed on our understanding of *On Liberty* more generally, but a basis provided from which (controversial) artistic expression may be seen to prevail.

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<sup>26</sup> See, for example, Fenwick, H. *Civil Liberties and Human Rights*, Routledge-Cavendish, 4<sup>th</sup> ed. (2007) at 302

<sup>27</sup> Barendt, E. *Freedom of Speech*, OUP, 2<sup>nd</sup> ed (2005) at 9-11



In Chapter One of *On Liberty*, Mill sets as his overarching goal the formulation of ‘one very simple principle’ concerning the relationship between society and the individual when it comes to matters of compulsion and control.<sup>28</sup> The principle is set out thusly:

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, *is to prevent harm to others*. His own good, either physical or moral, is not sufficient warrant.<sup>29</sup>

This classic liberal position and the exposition of the ‘harm principle’ would, therefore, appear to cover what Schauer labels ‘self-regarding conduct’<sup>30</sup>; whereby, put another way, conduct pertaining exclusively to the individual absolutely cannot be subjected to proscription. Whilst this can be applied with relative ease to the entirely internal freedom of thought or opinion, it is conceptually more difficult to apply to expression, which is, by its very nature, the conveyance of one’s thought *to others* so as to be in essence more external than the freedom of thought and thus more akin to Schauer’s ‘other-regarding conduct’. Indeed, Mill appears to recognise this phenomenon, noting that, “[t]he liberty of expression and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people,” only to immediately qualify the assertion by stating that, “but, being of almost of as much importance as the liberty of thought itself, and resting *in great part on the same reasons*, is practically inseparable from it.”<sup>31</sup>

Confusingly, therefore, rather than providing ‘one very simple principle’, by asserting that freedom of expression is ‘practically inseparable’ from freedom of thought Mill would seem to be somewhat muddying the water. In particular, it raises fundamental questions concerning the scope and delimitations of freedom of expression when it comes to potentially *harmful* expression; a confusion that is compounded further by the fact that the harm principle is not even mentioned in the second chapter’s defence of freedom of expression. In particular, for instance, it is not made entirely clear by Mill why harmful expression (expression that purportedly causes harm to *others*) ought to be treated any differently from any other act that causes harm. Is it because expression is virtually

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<sup>28</sup> Mill (n 21) at 14-15

<sup>29</sup> Mill (n 21) at 15 (emphasis added)

<sup>30</sup> Schauer (n 19) at 571

<sup>31</sup> Mill (n 21) at 18

synonymous with opinion, or is it because the harm caused is not the type of harm recognised by the harm principle?<sup>32</sup> At first glance neither explanation, it would seem, is fully sufficient.

### 1.2.3 Blasi's synthesis

In seeking to iron out Mill's thesis and provide an internally consistent defence of freedom of expression Vincent Blasi has proffered a compelling, and seemingly original, interpretation that is consistent with Mill's assertion that freedom of expression is 'practically inseparable' from the liberty of thought, whilst simultaneously allowing for the prohibition of expression in certain circumstances. Accordingly, under Blasi's construction, Mill offers, "both an absolute freedom...from context-independent general prohibitions of ideas and also a robust, albeit qualified, freedom from regulations of speech that turn on the particular circumstances of dissemination."<sup>33</sup> As such, Blasi's rendition will, it will be demonstrated later, have significant ramifications for the locating of artistic expression in the freedom of expression paradigm.

Fundamental to Blasi's interpretation of *On Liberty* is the now infamous 'corn-dealer' example, found within the opening pages of Chapter Three, entitled *Of Individuality, As One Of The Elements Of Well-Being*. Here Mill conceded that:

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a *positive instigation to some mischievous act*.<sup>34</sup>

That there are certain instances whereby expression may be legitimately curtailed is exemplified by Mill's assertion that the opinion that 'corn-dealers are starvers of the poor' could be subjected to differing levels of protection depending on the context in which they were expressed. Thus, the above opinion would, for Mill, enjoy absolute protection when circulated in the press but the exact same opinion, when expressed orally to an 'excited mob' outside the corn-dealer's house, could be legitimately subjected to restrictions.

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<sup>32</sup> Blasi, V. *Shouting 'Fire!' In A Theatre and Vilifying Corn Dealers*, 39 Capital University Law Review 535 (2011) at 538

<sup>33</sup> Blasi (n 32) at 542

<sup>34</sup> Mill (n 21) at 69 (emphasis added)

It is important to note that Blasi's understanding of the two different outcomes in the 'corn-dealer' example is to be distinguished on a qualitative, as opposed to a quantitative, basis. As such, the distinction is based on a high-levelled principle rather than a simple differing in the probability of harm. The principled, qualitative distinction is therefore grounded in the distinction made between what Mill terms 'discussion' and 'positive instigation.' Put another way, the fundamental difference is that of the social value attributed to the speaker in each instance.<sup>35</sup>

Nonetheless, the distinction made between 'discussion' and 'positive instigation' under Blasi's reading of Mill is successful in aiding our understanding of the relevance of the harm principle. Accordingly, the harm principle is not to be considered as a restriction on *all* expression but, rather, only that expression which is considered to be a *positive instigation to some mischievous act*. By way of further explanation, it is only those acts which, "*without justifiable cause* [that] do harm to others" that may be subject to restriction.<sup>36</sup> In further emphasising this distinction, Blasi points out that Mill did not state more broadly that, "acts that do harm to others may be regulated,"<sup>37</sup> but rather, only those acts that are not sufficiently *justified*. On such a reading, by creating a distinction between the inherent value of expressions made in differing circumstances, the fact that the harm principle is unmentioned in Chapter Two of *On Liberty* becomes less problematic than might first be thought on a first reading.

By asserting that 'discussion', under Mill's defence of freedom of expression, is to enjoy absolute protection, Mill is appealing to the branch of utilitarianism known as rule-utilitarianism.<sup>38</sup> For reasons outlined above in section 1.2.1, with regards to the principal reasons favouring a strong protection of freedom of expression, Mill considers that the long term benefits of allowing comprehensive and uninhibited 'discussion' will outweigh any short- and long-term social costs. Thus, Mill asserted that:

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<sup>35</sup> Blasi (n 32) at 539-540. As a brief aside, and in reference to the general criticism of Mill's position regarding the dependence upon a causal link between expression and the pursuit of truth, it is interesting to note that, by placing the focus on the individual speaker, Blasi's Millian principle would appear to lessen the immediacy with which expression, in fact, relates to truth. Indeed, this emphasis is subject to particular criticism by Schauer, as we shall see further below

<sup>36</sup> Mill (n 21) at 69 (emphasis added)

<sup>37</sup> Blasi (n 32) at 544

<sup>38</sup> See Section 1.2.1, *infra*

I consider utility as the ultimate appeal to all ethical questions; but it must be utility in the largest sense, grounded on the *permanent interests of man as a progressive being*.<sup>39</sup>

As such, the *permanent interests of man as a progressive being* require an absolute protection of ‘discussion’, given its purportedly inherent tendency towards the truth, even when that expression (in the form of ‘discussion’) may be considered, by some, as ‘harmful’. Conversely, under Blasi’s account, ‘positive instigation’ is seen to be subjected to the principles relating to act-utilitarianism,<sup>40</sup> which seeks to measure the utility arising from an individual set of circumstances. Accordingly, in such circumstances, the harm principle to have emerged from the ‘corn dealer’ example is of particular relevance.

In an attempt to clarify his understanding of Mill’s thesis, Blasi goes on to consider a case concerning freedom of expression and abortion, heard in respect of the First Amendment in the United States of America. The question addressed in *Planned Parenthood v. American Coalition of Life Activists*<sup>41</sup> was whether the messages on anti-abortion websites and posters were entitled to First Amendment protection. One poster contained the names, photographs, and addresses of thirteen doctors who were alleged to have performed abortions. The poster accused the doctors of crimes against humanity and offered a \$5000 reward for information leading to their arrest, conviction and revocation of their medical licence. Furthermore, one of the websites listed the names of about 200 doctors described as ‘abortionists’, with those doctors who had been murdered appearing with their names scored out, whilst those who had been injured appeared in a greyed-out font.<sup>42</sup>

In applying his synthesised understanding of Mill’s defence of freedom of expression Blasi first notes that the case would have been easier to adjudge had the messages simply contained general arguments against abortion, even to the extent of expressing the opinion that doctors who perform abortions are murderers who deserve to die.<sup>43</sup> Such expression would, Blasi argues, be akin to the publication of the view that ‘corn-dealers are starvers of the poor’ in a newspaper. What makes the *Planned Parenthood* case particularly difficult from a Blasi-Millian perspective is the fact that the doctor’s personal details had been

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<sup>39</sup> Mill (n 21) at 22

<sup>40</sup> For an overview of the distinction between act- and rule-utilitarianism see Harrison-Barbet (n 24) *infra* remembering that, in terms of protecting expression, act-utilitarianism is concerned with the utility of a specific example of expression.

<sup>41</sup> *Planned Parenthood v. American Coalition of Life Activists* 290 F.3d 1058 (9th Cir. 2002)

<sup>42</sup> Blasi (n 32) at 548-549

<sup>43</sup> Blasi (n 32) at 550

released, along with an extra degree of moral condemnation. It is important, however, to remember that under Blasi's construction of the Millian principle, an increase in the probability of harm is not enough, in and of itself, to distinguish protected from unprotected expression. Rather, it is the, "presence of special circumstances that make the dissemination something more than the expression of an opinion, circumstances that make it 'a positive instigation to a mischievous act'."<sup>44</sup> More particularly, for Blasi, it is the *intention* of the speaker that acts as the acid test in determining whether or not the expression falls within Mill's scope of the liberty of thought and discussion.<sup>45</sup>

On this question, Blasi considers the inclusion of the doctors' names, pictures and addresses to have crossed the threshold as depicted in the corn-dealer example for two reasons. Firstly, this additional information, "provides a basis to impute to the speakers the intention to cause the killing, harming, or intimidation of the named abortion providers, even if not necessarily the intention personally to undertake a violent act."<sup>46</sup> It is this idea of the speaker having 'violence in mind' that alters the expression from 'discussion' to 'positive instigation' and therefore falling outside of Mill's absolute protection. Secondly, and related to the first point, according to Blasi, the additional information changes the *focus* of the expression, "making it less of an invitation to discussion and reflection and more a guide to action."<sup>47</sup> Therefore, because such expression is not facilitative of Mill's quest for achieving truth, it falls out with the absolute protection afforded to 'discussion' and may therefore be subjected to the harm principle. Given that the publishing of names, pictures, and addresses is akin to 'positive instigation', such that the harm principle can come in to play, the increased likelihood of ensuing harm can therefore, under Blasi's construction of the Millian position, warrant the expression's restriction.

Whilst it may seem rather peculiar to promote the employment of two different approaches to the protection of freedom of expression within a single text, Blasi's account is advantageous in so far as it provides an absolute protection to the type of speech considered by Mill to be particularly valuable in achieving progress through knowledge and truth. As such, it avoids the temptation of "carv[ing] out specific exceptions to this generalisation [ie. of freedom of expression] [that] are likely to result in myopic judgments or social

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<sup>44</sup> Blasi (n 32) at 551

<sup>45</sup> Blasi (n 32) at 552

<sup>46</sup> Blasi (n 32) at 551

<sup>47</sup> Blasi (n 32) at 554

dynamics that undercut the process by which the benefits are generated.”<sup>48</sup> Indeed, this method of definitional absolutism – under which expression that is seen to promote some underlying value is afforded particular protection – can be seen, to varying degrees, in all of the positions considered below, irrespective of their underlying views regarding the essence of freedom of expression.

Moreover, the distinction to be made between ‘discussion’ and ‘positive instigation’ and the attributing of differing levels of protection thereafter can be seen to obliquely inform the development of the European Court of Human Rights’ jurisprudence concerning artistic expression under Article 10.<sup>49</sup> For instance, as we shall later see, the Court’s determination that the short film *Visions of Ecstasy*’s sexualised depiction of St Theresa and Christ in the case of *Wingrove* was ‘gratuitously offensive’ such that the expression made was of no societal value can be seen to align with Mill’s notion of ‘positive instigation’. Accordingly, if we continue with Mill’s parlance, the majority’s judgment can be seen to have accepted that the expression made in *Visions of Ecstasy* caused harm (in the form of offence) to others *without justifiable cause*. As such, the Court’s finding that there had been no violation of Article 10 can be seen as an approximation of an application of the Millian harm principle.

Conversely, the position taken in the case of *Wingrove* may be contrasted with that held by the majority’s judgment in *Karatas v. Turkey*. There, significance was placed on the fact that the unquestionably provocative expression was made in the form of poetry. Thus, when considered in the context of poetry – with its distinctive use of, for instance, hyperbole and metaphor – statements such as ‘I invite you to ... death’ and ‘blood shall be washed in blood’ were considered by the Court to be “an expression of deep distress in the face of a difficult political situation,”<sup>50</sup> (ie. contributing to a Millian ‘discussion’) rather than as what Mill would determine as a ‘positive instigation to some mischievous act’ (ie. a literal call to uprising). The extent to which specifically artistic qualities are recognised within a given instance of artistic expression can therefore be seen to be of particular significance in determining the extent to which controversial artistic expression may be protected. The interpretations concerning the role of art and artistic expression, and the extent to which artistic expression may be brought within the freedom of expression nexus, which will be

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<sup>48</sup> Blasi (n 32) at 548

<sup>49</sup> For a more detailed analysis see Chapter Four.

<sup>50</sup> *Karatas v. Turkey* (1999) (Application no. 23168/94) (HUDOC), para. 52

the subject of further attention Chapter Two of this thesis, will therefore be of fundamental import.

#### 1.2.4 Schauer's critique of the Blasi-Millian position

At this juncture it is perhaps worth pointing out a possible criticism of Blasi's Millian principle. Blasi himself acknowledged that the conclusions he reached when applying his version of the Millian principle to actual, difficult cases may well be disputed by other commentators.<sup>51</sup> Underlying this acceptance is the fact that it seems likely that in practice it will be rather difficult to draw the line between 'discussion' and 'positive instigation'; a point that seems all the more relevant with the phenomenal rise of technology in recent years. This increased availability of mass communication along with the ease with which opinions may be expressed to a potentially vast audience and the instantaneous nature of expression through social networking websites is such that expression will often have a potentially immediate impact that would seem to blur the distinction between 'discussion' and 'positive instigation' further still.

Whilst Blasi's interpretation of *On Liberty* succeeds, in large part, in rendering a coherent argument of Mill's largely rhetoric filled and, facially at least, internally inconsistent, thesis, Schauer maintains that this is achieved at the possible expense of understating the social consequences of speech and discussion.<sup>52</sup> Rather than seeking to argue that Chapter Two's defence of freedom of expression is an instantiation of Chapter One's consideration of liberty in general, Schauer prefers to consider the second chapter as an exception to the rest of the text.<sup>53</sup>

Blasi's distinction between 'discussion' and 'positive instigation' is also investigated by Schauer who notes that under Blasi's Millian principle:

The advocacy of non-instigating tyrannicide...would be tolerated by Mill, but that tolerance, if it is to be distinguished from the corn-dealer example, is premised on Mill's belief that discussing tyrannicide in a non-instigating and non-inflammatory environment cannot be considered a net harmful activity.<sup>54</sup>

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<sup>51</sup> Blasi (n 32) at 568

<sup>52</sup> Schauer (n 19) at 573

<sup>53</sup> Schauer (n 19) at 573

<sup>54</sup> Schauer (n 19) at 586

In developing his point, Schauer goes on to cite the dissent of Justice Holmes in the First Amendment case of *Gitlow v. New York* in which he proclaimed that, “every idea is an incitement”<sup>55</sup>; the point that Schauer seeks to assert being that even the soberest of expressions *may* result in the enacting of the consequences they are advocating. The advocacy of non-instigating tyrannicide *may*, after all, lead to tyrannicide.<sup>56</sup> Accordingly, Schauer disagrees on an empirical level, with Blasi’s Millian belief that whilst non-instigating expression may well cause harm, those harms will not be net-harms under the long term agenda promoted by the rule-utilitarian methodology. Such a stance, according to Schauer, depends on either an “unjustified optimism about reason” or the acceptance of “such a morally freighted conception of what is to count as harm that Millian net-harms and harms *simpliciter* emerge as not having very much in common.”<sup>57</sup>

Referring to Mill’s assertion that liberty of expression is ‘practically inseparable’ from that of opinion, Schauer stresses that there is little in the way of argument proffered by Mill as to *why* exactly the other-regarding activity of expression ought to be considered any more inseparable from the liberty of thought than any other form of other-regarding activity or conduct that affects others.<sup>58</sup> Whilst the underlying justification for this distinction may be absent, Chapter Two of *On Liberty*, when taken as a whole, may nevertheless provide good reason for the rigorous protection of free expression.

Indeed, Schauer’s fundamental criticism of Blasi’s interpretation is that it fails to mention, in an appropriate level of detail, the epistemic arguments in favour of freedom of expression advanced by Mill in Chapter Two of *On Liberty*.<sup>59</sup> Particularly, Chapter Two of *On Liberty* suggests, quite explicitly, that freedom of expression contributes *directly* to the discovery of truth whereas Blasi’s account seems to consider the identification of truth as a by-product of the development of the individual.<sup>60</sup> Thus, Schauer points to the fact that Mill talks about historic eras possessing or not possessing knowledge, the implication being that knowledge is something not only possessed by individuals but by societies at large.<sup>61</sup> As such,

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<sup>55</sup> *Gitlow v. New York* 268 U.S. 652 (1925) at 673 (Holmes, J., dissenting)

<sup>56</sup> Though note Scanlon’s thesis, according to which the chain causation between the expression of tyrannicide and the action of tyrannicide would be broken on account of the actor’s autonomy. For further discussion of Scanlon’s argument from autonomy see section 1.3 *infra*.

<sup>57</sup> Schauer (n 19) at 587-588

<sup>58</sup> Schauer (n 19) at 581

<sup>59</sup> Schauer (n 19) at 588-590

<sup>60</sup> For more on the notion of freedom of expression being a vital tool for individual development see the following discussion pertaining to the self-fulfilment rationale (section 1.3 *infra*).

<sup>61</sup> Schauer (n 19) at 589



according to Schauer, the relationship between unfettered expression and the advancement of social knowledge as posited by Mill is in fact much closer than Blasi's reading of *On Liberty* – according to which free expression is required in order to develop the human character which in turn advances societal knowledge – would suggest. In sum, Schauer postulates that, “[i]f Mill were not so concerned about the more directly social than the individual character-developing value emanating from the liberty of discussion, it is hard to see why he would have devoted so much time to his epistemic arguments.”<sup>62</sup>

Schauer's interpretation might, however, lead one to ask the question of where the harm principle fits in to such a formulation. On this point it is important to remember that Schauer considers the arguments advanced in Chapter Two's defence of freedom of expression as being an exception to that of Chapter One's general principles concerning the relationship between the individual and society. Therefore, Chapter Two concerns the protection of potentially harmful conduct *despite* its harmfulness (and because of the societal, or utilitarian, good that free expression promotes) whereas Chapter One argues why socially harmless conduct should be free from sanction. Accordingly, this approach too explains why there is no need for the harm principle to feature in Chapter Two's exposition of Mill's philosophy concerning the right to freedom of expression. As such, by considering Chapter Two as an exception to Chapter One, a more robust defence of freedom of expression, so Schauer suggests, can flourish, since it reinforces the view that even purportedly harmful expression is to be protected.<sup>63</sup> As such, Schauer's argument seems to avoid the difficulties, appreciated even by Blasi, in trying to distinguish between 'discussion' and 'positive instigation.'

The interpretation put forward by Schauer is appealing in as much as it more consistently aligns with our intuitions about the basic Millian principle: namely that uninhibited expression is, for a number of reasons outlined in section 1.2.1 above, more likely to produce societal 'truth', however defined. However, Schauer's criticisms of Blasi's individualistic approach are perhaps less fatal than might first appear. By refocusing the importance of free discussion within the domain of the individual, rather than the direct social value attributable to free expression, the usual charge that there is no conclusive empirical support for the claim that there is a causal link between greater expression and the fulfilment of truth is surely diminished. Also, by locating the debate within the domain

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<sup>62</sup> Schauer (n 19) at 589

<sup>63</sup> Schauer (n 19) at 592

of the individual a more tangible, individual right may be more easily established from which, when coupled with the distinction made between ‘discussion’ and ‘positive instigation’ and applied to the distinctive nature of art, outlined in Chapter Two of this thesis, may provide a more solid foundation for the protection of artistic expression. From a pragmatic viewpoint, therefore, such an approach may be seen to more naturally fit within the development of the European Court of Human Rights’ case law concerning artistic expression within Article 10 of the European Convention on Human Rights.

### **1.3 THE ARGUMENT(S) FROM INDIVIDUAL AUTONOMY AND SELF-FULFILMENT**

#### **1.3.1 Individual autonomy and self-fulfilment: An introductory overview**

In contrast to the traditional arguments from truth and democracy – according to which freedom of expression’s value is recognised largely, if not necessarily exclusively, in consequentialist terms – arguments deriving from notions of autonomy and self-fulfilment consider the value of freedom of expression less in terms of the good consequences that free expression brings *per se* and more as a good in and of itself. Thus, in establishing autonomy’s intrinsic value, Crocker first defines autonomy as, “making one’s own choices,” before going on to assert that, “the autonomous person is one who goes his or her own way.”<sup>64</sup> Accordingly, “since it contributes to the moral status of individuals, autonomy itself must,” under Crocker’s assessment, “be valuable.”<sup>65</sup> In essence, therefore, for those subscribing to autonomy-based arguments, freedom of expression is considered to be an essential condition for ensuring an individual’s autonomy, primarily with regards to its importance in informing his decision-making process.<sup>66</sup>

Similarly, freedom of expression’s intrinsic value may also be regarded in terms of its necessity for promoting an individual’s self-fulfilment. The ability to express oneself is, as Barendt notes, a defining feature of what it means to be human.<sup>67</sup> Thus, as cognitive, communicative and social beings, a right to freedom of expression may therefore be considered as an essential prerequisite in guaranteeing our humanity. Moreover, it has been

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<sup>64</sup> Crocker, L. H., *Positive Liberty: An Essay in Normative Political Philosophy*, Springer Netherlands (1980) at 114

<sup>65</sup> Crocker (n 64) at 114

<sup>66</sup> See, for instance, Redish (n 18) at 593

<sup>67</sup> Barendt (n 27) at 13

suggested that it is through the development of mankind's ability to, for instance, reason, use language and convey emotions or ideas that gives us, as individuals, a sense of meaning and place in the world.<sup>68</sup> For those who subscribe to the self-fulfilment school of thought, the particular significance of the right to freedom of expression can therefore be seen to lie in its capacity to establish an environment in which individuals are free to fully realise those attributes considered essential for human flourishing.

There is therefore, as Barendt recognises, a certain degree of overlap between those arguments seeking to identify the value of freedom of expression in its guaranteeing of autonomy and its promotion of individual self-fulfilment.<sup>69</sup> Both positions, broadly speaking, consider that the suppression of expression impedes or erodes some fundamental aspect of an individual's capacity and being, such that expression ought to be left largely unimpeded, thereby allowing individuals to be left free to determine their own formulation of the good life. Indeed, permeating throughout much of the discussion concerning the intrinsic, individual nature of the right to freedom of expression is a certain confusion with regards to the terms that have been employed. Loughlan has, for instance, observed that the terms 'self-expression', 'self-development', 'self-determination' and 'autonomy' have been used, "reasonably interchangeably" in the literature.<sup>70</sup> Similarly, Post notes that the terms 'self-fulfilment' and 'self-expression' have been employed in the literature to denote the type of autonomy typically associated with the, "Kantian commitment to the equal dignity of persons to be governed by their own sense of reason."<sup>71</sup> The confusion surrounding the ambiguity with which notions of autonomy and self-fulfilment have been applied in the literature is confounded further in light of Redish's assessment of the thesis advanced by Baker 'autonomy'. Thus, as Redish notes, despite adopting the term 'liberty' in his free speech principle – a term that is, itself, often used interchangeably with 'autonomy' – it would appear that Baker is, in actuality, referring to the concept of individual self-fulfilment.<sup>72</sup> As such, we are left in the curious position whereby 'self-fulfilment' has been understood in terms of 'autonomy' and, conversely, 'autonomy' in terms of 'self-fulfilment'.

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<sup>68</sup> Emerson, T. *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1962-1963) at 879

<sup>69</sup> Barendt (n 27) at 14

<sup>70</sup> Loughlan, P. *Copyright Law, Free Speech and Self-Fulfilment*, 24 Sydney L. Rev. 427 (2002) at 431 (fn. 12)

<sup>71</sup> Post, R. *Participatory Democracy and Free Speech*, 97 Va. L. Rev. 477 (2011) at 479

<sup>72</sup> Redish (n 18) at 593 (fn. 18)

The root of the somewhat ambiguous relationship between autonomy and self-fulfilment becomes clearer upon closer examination of Baker's thesis, in which it is stipulated that, "[t]he emphasis on 'self' in self-fulfilment requires the theory to delineate a realm of liberty for self-determined processes of self-realization."<sup>73</sup> Put another way, there may be supposed to be an inherently symbiotic relationship between autonomy and self-fulfilment. For if self-fulfilment supposes that an individual be free to exercise a right to freedom of expression in order to advance his personal development, such a process demands that he is considered autonomous in the making of the decisions affecting that development. On such a view, autonomy may be regarded as playing a fundamental, if not essential, part in promoting individual self-fulfilment.

Dworkin, however, is keen to identify a distinction, maintaining that, far from being two sides of the same coin, the principles of autonomy and self-fulfilment (especially when considered from a consequentialist perspective) are, in fact, antagonistic.<sup>74</sup> The antagonism Dworkin notes lies in the hypothesis that, in considering the achievement of an individual's self-fulfilment to be contingent on, and equivalent to, an individual realm of autonomy, the power that individuals ultimately have with regards to putting in to practice the conditions that they consider necessary for their flourishing may, in fact, be reduced.<sup>75</sup> Forming the crux of Dworkin's assertion in this regard is the observation that, "[i]f we are concerned only with the power of individuals to influence the conditions in which they must try to thrive, any theory of self-development that forbids the majority the use of politics and the law...is at least *prima facie* self-defeating."<sup>76</sup>

In further eliciting the seemingly counter-intuitive results associated with the conflation of the autonomy and self-fulfilment principles, Dworkin invites us to suppose a scenario in which freedom of expression *is* understood in terms of enabling individuals to decide for themselves the best conditions for their own personal flourishing, such that the banning of pornography would be considered wrong. Such a framework would in fact, Dworkin suggests, severely limit the options available to those individuals in the society who consider the availability of pornography to have a detrimental effect on the society in which they wish to live, even if they formed a majority.<sup>77</sup> In such circumstances, the individual

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<sup>73</sup> Baker, E. *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1977-1978) at 991

<sup>74</sup> Dworkin, R. *Is There A Right To Pornography?*, 1 Oxford J. Legal Stud. 177 (1981) at 191

<sup>75</sup> Dworkin (n 74) at 191

<sup>76</sup> Dworkin (n 74) at 191

<sup>77</sup> Dworkin (n 74) at 190-191

self-fulfilment of the majority could not be said to have been given full effect. The answer, for Dworkin, then, lies in considering the issue of freedom of expression from the perspective of individuals' 'moral independence' acting as a buttress against majoritarian preferences, as distinct from notions of advancing one's self-fulfilment.<sup>78</sup>

In light of Dworkin's assertion, the following discussion will begin with an overview of the argument from autonomy associated with Scanlon's influential paper *A Theory of Freedom of Expression* – a thesis which indeed shares a degree of similarity with that of Dworkin<sup>79</sup> – and its short fallings, before shifting the focus of inquiry on to an assessment of the principle of self-fulfilment.

### 1.3.2 An exposition of Scanlon's *A Theory of Freedom of Expression*<sup>80</sup>

In the decades since its publication in 1972, the argument advanced in *A Theory of Freedom of Expression* has confirmed, as Scanlon himself later reflected, his "position in the Dantean Inferno of free speech debates."<sup>81</sup> Yet despite retracting and redeveloping his position in the intervening years, Scanlon's account remains an important contribution to the freedom of expression discourse. The particular importance of Scanlon's thesis lies, for Barendt, in the light that it sheds on the notion that the suppression of expression is wrong precisely because, "it prevents free people from enjoying access to ideas and information which they need to make up their own minds."<sup>82</sup> Thus, in identifying freedom of expression's value squarely within the confines of personal autonomy, Scanlon's theory promotes the importance of an individual being able to, "see himself as sovereign in deciding what to believe and in weighing competing reasons for action."<sup>83</sup>

Whilst Scanlon considered his approach to be a 'natural extension' of Mill's thesis,<sup>84</sup> it has been suggested that Scanlon's position shares more in common with the arguments

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<sup>78</sup> Dworkin (n 74) at 194-206. See, also, Kress, K. and Anderson, S., *Dworkin in Transition*, 37 Am. J. Comp. L. 337 (1989) esp. at 345

<sup>79</sup> Moon, R. *The Scope of Freedom of Expression*, 23 Osgoode Hall L. J. 331 (1985) at 341-342 (who argues that Dworkin's thesis of treating individuals with equal respect, despite its emphasis on the rights of the speaker, is nevertheless similar to the position advanced by Scanlon in *A Theory of Freedom of Expression*)

<sup>80</sup> Scanlon, T. *A Theory of Freedom of Expression*, 1 Philosophy & Public Affairs 204 (1972)

<sup>81</sup> Scanlon, T. *Why not base free speech on autonomy or democracy?*, 97 Va. L. Rev. 541 (2011) at 546

<sup>82</sup> Barendt (n 27) at 18

<sup>83</sup> Scanlon (n 80) at 215

<sup>84</sup> Scanlon (n 80) at 213

pertaining to the Kantian or Rawlsian notions of rational, autonomous agency.<sup>85</sup> Scanlon's intent notwithstanding, by distancing his argument from the largely consequentialist reasoning associated with Mill, Scanlon's thesis can be seen to avoid the customary criticism that it is difficult, if not impossible, to predict with any degree of accuracy, what the long term benefits or consequences of uninhibited expression will actually be.

In establishing the basis for his thesis, Scanlon suggests that our intuitions with regards to the suppression of expression tend to centre on the notion that certain *justifications* for restricting expression are illegitimate, as opposed to the supposition that certain restrictions are illegitimate *per se*.<sup>86</sup> For Scanlon, then, illegitimate justifications are those, "which appeal to the fact that it would be a bad thing if the view communicated by certain acts of expression were to become generally believed," whereas legitimate justifications, "are those that appeal to features of acts of expression (time, place, loudness) other than the views they communicate."<sup>87</sup> As such, Scanlon recognises the important distinction to make as being:

...between expression which moves others to act by pointing out *what they take to be good reasons for action* and expression which gives rise to action by others in other ways, e.g., by providing them with the *means* to do what they wanted to do anyway.<sup>88</sup>

Scanlon cites, as an example of the former, such expression as, 'you ought to rob a bank'; whilst an example of the latter form of expression might include the provision of detailed plans of a bank or the combination to the bank's safe.<sup>89</sup> In this regard, parallels might therefore be drawn with the distinction made by Mill between 'discussion' (protected expression) and 'positive instigation' (expression that may be restricted) that is so crucial to Blasi's construction of the Millian position. The distinction for Scanlon – according to which expression of the 'you ought to rob a bank' variety ought to be protected – is underpinned by an individual's autonomy, however, and not the supposed benefits that unimpeded 'discussion' brings for long-term, societal utility, as proposed under Blasi's reading of the Millian position.<sup>90</sup>

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<sup>85</sup> Amdur, R. *Scanlon on Freedom of Expression*, 9 *Philosophy & Public Affairs* 287 (1980)

<sup>86</sup> Scanlon (n 80) at 209

<sup>87</sup> Scanlon (n 80) at 209

<sup>88</sup> Scanlon (n 80) at 212 (emphasis added)

<sup>89</sup> Scanlon (n 80) at 212

<sup>90</sup> See section 1.2.3 *infra*

That the statement, “you ought to rob a bank,” as well as any supporting arguments as to why robbing banks might be a good thing, ought to be protected is explained by Scanlon with particular reference to the autonomy of the listener. Thus, according to Scanlon’s thesis:

A person who acts on reasons he has acquired from another’s act of expression acts on what *he* has come to believe and has judged to be a sufficient basis for action. The contribution to the genesis of his action made by the act of expression is, so to speak, superseded by the agent’s [ie. ‘listener’s’] own judgement.<sup>91</sup>

The essence of Scanlon’s theory, therefore, lies in the suggestion that the causal link between the speaker’s expression and the listener’s subsequent action is broken by the listener’s autonomy, such that the speaker’s expression cannot be held liable for the ensuing actions undertaken by the listener. In contrast, providing the combination to the safe is considered to amount to, “something more than merely the communication of persuasive reasons for action,” such that the accomplice’s expression – in as much as it is in fact ‘expression’ – may legitimately be censured.<sup>92</sup>

At the heart of Scanlon’s thesis, therefore, lies the premise that, “the authority of governments to restrict the liberty of citizens in order to prevent certain harms does not include authority to prevent these harms by controlling people’s sources of information to insure [sic] that they will maintain certain beliefs.”<sup>93</sup> Accordingly, Scanlon seeks to portray his theory of freedom of expression, not as an individual right *per se*, but rather as a limitation on the power that the State has in controlling individuals.<sup>94</sup> As such, whilst recognising that freedom of expression may well flourish under conditions in which it is recognised that, as autonomous beings, individuals ought to be free to make their own minds up, Scanlon insists that his thesis ought not be regarded as suggestive of finding a violation of the right to freedom of expression, “whenever someone is deprived of information necessary for him to make an informed decision on some matter that concerns him.”<sup>95</sup> Instead, as Moon explains, “freedom of expression,” under Scanlon’s proposal, “does not protect a certain class of expressive acts as valuable in themselves, rather it excludes certain reasons for restricting expression.”<sup>96</sup>

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<sup>91</sup> Scanlon (n 80) at 212

<sup>92</sup> Scanlon (n 80) at 212-213

<sup>93</sup> Scanlon (n 80) at 222

<sup>94</sup> Scanlon (n 80) at 221-222

<sup>95</sup> Scanlon (n 80) at 222

<sup>96</sup> Moon (n 79) at 341

### 1.3.3 A critique of the Scanlonian position

Arguably the most ardent criticism of the position advanced in *A Theory of Freedom of Expression* to have emerged since the paper's publication has come from Scanlon himself. It is indeed significant that Scanlon retracted substantial elements of his argument in a later article, saying that his initial formulation was too broad and too sweeping to offer a plausible, working theory of freedom of expression.<sup>97</sup> More recently still, in describing himself as, "someone who once made a mistaken appeal to autonomy as the centerpiece of a theory of freedom of expression," Scanlon has implored free speech scholars to refrain from identifying autonomy as the (sole) basis for freedom of expression's value.<sup>98</sup>

Central to much of the criticism levelled at the thesis put forward in *A Theory of Freedom of Expression* is the suggestion that the coherent application of a strong, autonomy-based defence of freedom of expression would protect many instances of expression deemed to be intuitively, as well as practically, unacceptable with no sufficient theoretical basis for their exclusion from a right to freedom of expression. Thus, with regards to theoretical basis for certain expression's exclusion from protection, the approach provided by Scanlon has been criticised in light of apparent internal inconsistencies. Under Scanlon's theory, it will be remembered, the 'speaker's' expression, 'you ought to rob a bank', in the bank robbery example is considered to be protected because his act of expression is said to be superseded by the listener's own rational judgement and decision-making process in light of his inherent autonomy. Yet, in another hypothetical example provided by Scanlon, in which a formula is given for the manufacturing of nerve gas, the expression was deemed to be unprotected.<sup>99</sup>

As Robert Amdur points out, the distinction between the two instances is not made entirely clear by Scanlon. After all, an individual must himself *decide* to manufacture and use the nerve gas just as he decides to rob the bank. As Amdur postulates, "If [the 'listener's'] decision 'negatives' causal connection in one case, why not in the other?"<sup>100</sup> According to the same logic, it is not clear why defamation (assessed by Scanlon to be unprotected

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<sup>97</sup> Scanlon, T., *Freedom of Expression and Categories of Expression*, 40 University of Pittsburgh Law Review 519 (1978-1979)

<sup>98</sup> Scanlon (n 81) at 546

<sup>99</sup> Scanlon (n 80) at 211

<sup>100</sup> Amdur (n 85) at 298



expression<sup>101</sup>) is any different in principle from statements that lead another to rob the bank, or murder a third person.<sup>102</sup> For Amdur, “Scanlon seems to be saying that if A makes statements that lead B to form an adverse opinion of C the state may interfere – while on the other hand, if he ‘merely’ makes statements that lead B to murder C it may not.”<sup>103</sup> From an autonomy point of view, there seems to be little difference in principle between these instances. Furthermore, Amdur also notes with interest that in Scanlon’s defamation example, he uses the word “cause,” whereas in his other (protected) examples of incitement he says, “give rise to” or “result in.”<sup>104</sup> A distinction in the directness of causation therefore seems to have been made without a sufficient level of justification.

However, a more fundamental criticism than that of the internal inconsistencies highlighted in Amdur’s critique lies in the notion that autonomy cannot, at least on its own, provide a sufficient basis for a right to freedom of expression. Underlying this pervasive criticism is the observation that appeals to autonomy do not, or cannot, sufficiently distinguish expression from any other action that an autonomous person may engage in. For if we agree with Crocker’s depiction of an autonomous person being a person who goes his own way,<sup>105</sup> it is conceivable to think of a plethora of examples out with the realm of expression that would, nonetheless, remain instantiations of an individual’s autonomy. Whilst it is clear that those seeking to identify freedom of expression’s value in terms of autonomy do not, in fact, seek to claim that every human action ought to be covered by the right, the assumption remains, as Moon points out, that autonomy protects communication.<sup>106</sup> What is not so clear, as Moon goes on to submit, is why the scope of one’s autonomy should be *limited to acts of communication*.<sup>107</sup> Thus, in recognising that the value of autonomy is not unique to expression, such that it extends also to the actions of individuals, Post asserts that notions of autonomy do little to explain the normative scope of the right to freedom of expression.<sup>108</sup>

In addition to general criticisms concerning the breadth of scope with which appeals to autonomy would bestow on a right to freedom of expression are concerns that Scanlon’s

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<sup>101</sup> Scanlon (n 80) at 211

<sup>102</sup> Amdur (n 85) at 299-300

<sup>103</sup> Amdur (n 85) at 300

<sup>104</sup> Amdur (n 85) at 299

<sup>105</sup> Crocker (n 64) at 114

<sup>106</sup> Moon (n 79) at 340

<sup>107</sup> Moon (n 79) at 340

<sup>108</sup> Post (n 71) at 479

thesis does not recognise the harms that expression might cause. As Koppelman notes, if it is accepted that, “speech cannot be prohibited simply because it results in listeners having false beliefs or in listeners coming to believe that they ought to perform harmful actions,” the notion of autonomy employed by Scanlon is simply too insensitive to the costs that may ensue from expression.<sup>109</sup> Indeed, Scanlon later reflected that there are examples in which paternalism, in the form of suppressing certain expression, may be justified and for which his original hypothesis could not account for: bans on deceptive advertising and cigarette advertising on television being two such examples.<sup>110</sup> For Barendt, however, the proscription of such expression as deceptive advertising may be incorporated in to an argument from autonomy with relative ease.<sup>111</sup> For since we, as individuals, generally lack the ability to make an independent evaluation of the claims made by advertisers, laws restricting the use of deceptive marketing actually enhances our ability to make decisions and thus promotes our autonomy.

Of even greater concern to the overall soundness of Scanlon’s thesis, therefore, is the suggestion that it that rational, autonomous people may agree that certain expression ought to be restricted. As Greenwalt points out, in order to protect themselves from expression perceived as being in some way harmful, “rational, autonomous people might agree to constraints that would inhibit to some degree the extent to which all citizens, including themselves, would have available information and advocacy that would maximally serve rational and autonomous choice.”<sup>112</sup> For instance, it is conceivable to suppose that autonomous people might, upon reflection, accept that racist hate speech or pornography ought to be regulated by the State, either for fear of the harm to society that such expression might engender or, as Barendt suggests, on the basis that they find such expression hard to evaluate, much in the same way as consumers are incapable of independently assessing the claims made by advertisers.<sup>113</sup> Indeed, Scanlon later conceded on this point, saying that, “there are in general limits to the sacrifices we are willing to make to enhance our decision-making capacity. Additional information is sometimes not worth the cost of getting it.”<sup>114</sup>

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<sup>109</sup> Koppelman, A. *Veil of Ignorance: Tunnel constructivism in free speech theory*, 107 Nw. U. L. Rev. 647 (2012-2013) at 668

<sup>110</sup> Scanlon (n 97) at 532-533

<sup>111</sup> Barendt (n 27) at 17

<sup>112</sup> Greenwalt, K. *Free Speech Justifications*, 89 Colum. L. Rev. 119 (1989) at 152

<sup>113</sup> Barendt (n 27) at 17

<sup>114</sup> Scanlon (n 97) at 533

Moreover, the theory posited in *A Theory of Freedom of Expression* may be open to criticism for its failure to sufficiently address the interests that the speaker has in expressing themselves.<sup>115</sup> In noting the listener-centric approach adopted by Scanlon, Barendt has, for instance, noted the oddity inherent in justifying the protection of unpopular speech in terms of the interests that the audience has in such expression (an interest that would presumably be negligible), rather than on the supposedly stronger claims that might be made by the speaker.<sup>116</sup> Further still, and of particular significance in light of the difficulties that Scanlon's position encounters with regards to purportedly harmful expression, Post's recognition that the principle of autonomy, "lacks resources to adjudicate the many situations in which the autonomy of speakers and the autonomy of audiences are in tension,"<sup>117</sup> adds yet another hurdle for adherents of the autonomy principle to surmount.

That tensions between the autonomy of the speaker and that of the listener may derive from, and be exacerbated by, the multitude of ways in which autonomy may be construed would further emphasise a significant flaw facing autonomy-based arguments for the general protection of freedom of expression.<sup>118</sup> Which leads us back to the question of terminology and the ambiguity with which notions of autonomy and self-fulfilment have been applied in the literature. According to Scanlon, one such tension that broad appeals to autonomy might instil lies in the juxtaposition between, on the one hand, the speaker's interest in being able to impart their ideas and, on the other, the interest that audiences have in not being exposed to a cacophony of noise, thereby enhancing the environment in which they are free to make up their own minds.<sup>119</sup> Attributing the principle of autonomy to the interests of both parties fails, under such circumstances, to further our appreciation of the underlying conflict in any meaningful way.<sup>120</sup>

Thus, whilst arguments from autonomy are appealing in that they place the individual at the heart of the equation – a position which, given the notion of the artist being something of a 'free spirit', at first glance might be considered to offer a natural justification for artistic expression's existence within the freedom of expression paradigm – Scanlon's thesis, when considered in light of the criticisms that the theory has received, has serious inadequacies as a comprehensive theory of freedom of expression. Such inadequacies are indeed

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<sup>115</sup> See, for instance, Dworkin, R.M. (ed), *The Philosophy of Law*, OUP (1977) at 14-16

<sup>116</sup> Barendt (n 27) at 17

<sup>117</sup> Post (n 71) at 488

<sup>118</sup> Scanlon (n 81) at 547-548

<sup>119</sup> Scanlon (n 81) at 548

<sup>120</sup> Scanlon (n 81) at 548

compounded when one considers that Scanlon's retraction.<sup>121</sup> It would appear that the coherent application of a strong, autonomy based defence of freedom of expression would protect many instances of expression deemed to be intuitively, as well as practically, unacceptable with no sufficient theoretical basis for their exclusion from a right to freedom of expression. Given freedom of expression's qualified nature – such that the law concerning the right is largely based on its lawful *limitation*; a notion that will be further explored in Chapter Three of this thesis with regards to the coverage-protection distinction promoted by Schauer – attempting to locate artistic expression within the confines of a strictly autonomy-based argument would, it is suggested, proffer too weak a justification prone to criticism for the very breadth of its proposed coverage.

### 1.3.4 The self-fulfilment rationale

In common with the argument from autonomy, the self-fulfilment rationale for the protection of freedom of expression is, according to Emerson, “justified first of all as the right of an individual purely in his capacity as an individual.”<sup>122</sup> Moreover, the self-fulfilment rationale seeks to identify the prescient value of expression's exercise in its being, “an integral part of the development of ideas, of mental exploration and of the affirmation of self.”<sup>123</sup> Accordingly, in recognising that expression forms a fundamental aspect of an individual's development and flourishing, adherents of the self-fulfilment rationale would maintain, as Loughan explains, that to interfere with an individual's expression is, “to interfere with the development and realisation of the self and the manifestation of a unique personality.”<sup>124</sup> Further still, since the ability to express oneself is so fundamentally entwined in an individual's personality and being, the suppression of an individual's expression equates, so Emerson submits, to an undermining of that individual's dignity.<sup>125</sup> Indeed, such sentiments may be traced back to the defence of freedom of expression advanced by Milton and the stipulation that restraints on expression amount to, “the greatest displeasure and indignity to a free and knowing spirit that can be put upon him.”<sup>126</sup> From the perspective of the self-fulfilment rationale, the right to freedom of expression is seen to act as a vital guarantor of our individual humanity; its exercise a direct and intrinsic instantiation of what it means to be human.

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<sup>121</sup> See generally, Scanlon (n 97)

<sup>122</sup> Emerson (n 68) at 879

<sup>123</sup> Emerson (n 68) at 879

<sup>124</sup> Loughlan (n 70) at 431

<sup>125</sup> Emerson (n 68) at 879

<sup>126</sup> Milton, J. *Aeropagitica*, Everyman's Library ed. (1927) at 21

Viewed in such terms, the right to express oneself has therefore been described as a ‘core intrinsic individual right,’<sup>127</sup> the protection of which is required in order to guarantee a fundamental aspect of human behaviour. However, to the extent that the self-fulfilment rationale is seen to explain the intrinsic nature of the right to freedom of expression solely in terms of its significance for the individual who is expressing himself, there runs a danger of overlooking the importance that freedom of expression plays for the audience. For if we were to understand Emerson’s suggestion – that freedom of expression forms, “an integral part of the development of ideas, of mental exploration and of the affirmation of self”<sup>128</sup> – in isolation, we might conclude, as Baker indeed does, that, “the values supported or functions performed by protected speech result from that speech being a manifestation of individual freedom and choice.”<sup>129</sup>

For Baker, then, only that expression which might be said to be a manifestation of an individual’s personal convictions and values ought to be protected, such that commercial expression – a form of expression driven ultimately by motivations of profit – would fall out with the protection afforded by Baker’s theory.<sup>130</sup> Accordingly, whilst recognising the instrumental value of freedom of expression – that is to say, the value that expression has in developing an individual’s personal and cognitive faculties – the emphasis placed by Baker on the motivation of the speaker fails, as Redish explains, to appreciate the importance that receiving expression plays in the development of an individual’s faculties.<sup>131</sup> This limitation to Baker’s thesis, if extrapolated further, may be seen to have profound implications for artistic expression. For instance, the fact that an author might well write in order to sustain a living rather than to express his personal convictions or advance his own self-fulfilment does not, as Redish notes, mean that the work he produces is incapable of developing the faculties of the audience who read his book.<sup>132</sup> For the value artistic expression to be fully appreciated within the self-fulfilment rationale therefore requires recognition of the importance of receiving as well as conveying expression.

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<sup>127</sup> Campbell, T. *Rationales for Freedom of Communication* in Campbell, T. and Sadurski, W. (eds), *Freedom of Communication*, Aldershot (1994) at 33

<sup>128</sup> Emerson (n 68) at 879

<sup>129</sup> Baker, E. *Commercial Speech: A Problem in the Theory of Freedom*, 62 Iowa L. Rev. 1 (1976) at 3

<sup>130</sup> Baker (n 129) 3

<sup>131</sup> Redish (n 18) at 620-621 (incl. text at fn. 107)

<sup>132</sup> Redish (n 18) at 621

Incorporating the audience's interests in freedom expression in to the self-fulfilment rationale is, however, possible. For instance, Chesterman describes the essence of the self-fulfilment rationale in terms of the individual being free not only to, "formulate and express their own statements on any issue which to them appears important," but also to, "be exposed to the full range of competing arguments."<sup>133</sup> Indeed, having access to the expression of others is an important consideration under Emerson's construction of the self-fulfilment rationale as well. As such, ensuring effective and equal participation in the generation of one's surrounding culture and society requires, as Emerson contends, that individuals have access to knowledge in order to more comprehensively develop their own views and thereby aid their own self-fulfilment.<sup>134</sup>

Following from the premise that the right to freedom of expression lies at the very heart of man's existence, the self-fulfilment rationale identified by Emerson rests also on two further assumptions specifically concerning the relationship between the individual and the society in which he finds himself.<sup>135</sup> In this regard, according to Emerson, for the self-fulfilment rationale to be fully realised (thereby enabling individuals with the opportunity to contribute to the creation of a 'common culture') it must be presumed that an overriding objective of the state, as a servant of the people, is the promotion of the welfare of its individuals and that, secondly, all individuals must be treated equally.<sup>136</sup> Accordingly, in suggesting that freedom expression be recognised as an intrinsic, individual right, the exercise of which is essential for individual growth it follows that its exercise should be enjoyed without discrimination. For any retardation of an individual's ability to formulate ideas (an ability which is, as we have noted, dependent upon him having access to the freedom of expression output of others), express himself and, in so doing, participate in the incremental development of his surrounding culture, is, in essence, an affront to his dignity. To suggest otherwise would, as Emerson submits, "elevate society and the state to a despotic command and [...] reduce the individual to the arbitrary control of others."<sup>137</sup>

As such, a more pertinent criticism of the self-fulfilment rationale than that concerning its incorporation of audience's interests may be found in its imbuing freedom of expression with a particularly strong, wide-reaching protection. For if, on the one hand, it is accepted

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<sup>133</sup> Chesterman, M., *Freedom of Speech In Australian Law*, Ashgate (2000) at 20 (emphasis added)

<sup>134</sup> Emerson (n 68) at 880

<sup>135</sup> Emerson (n 68) at 880

<sup>136</sup> Emerson (n 68) at 880

<sup>137</sup> Emerson (n 68) at 880

that an individual's being is instantiated through his expression and, on the other, that the state is required to promote individual welfare without discrimination, then it must follow that virtually *any* restriction on expression must be regarded as suspect. Furthermore, since the value of a given expression is therefore ultimately seen to reside in the assessment made by each individual by way of his personal development and exploration, a narrow reading of the self-fulfilment principle therefore demands that all expression be considered of equal value for the purposes of an individual's right to freedom of expression.<sup>138</sup>

A particular concern in this regard lies in the potential scope that arguments deriving from the self-fulfilment rationale bestow upon the right to freedom of expression. As Greenwalt has pointed out, "[the self-fulfilment rationale] may reach widely and strongly enough to some other matters so that alone it would not warrant anything properly identified as a distinctive principle of free speech."<sup>139</sup> The point is similarly made by Schauer, who suggests that, whilst, "[t]he argument from self-fulfilment can be a powerful argument for freedom in a very broad sense...it tells us nothing in particular about freedom of speech."<sup>140</sup> For Schauer, the breadth of the self-fulfilment rationale's scope renders it simply as an instantiation of a general liberty.<sup>141</sup>

There is, as such, a fundamental difficulty inherent in the extent to which the self-fulfilment rationale is capable of satisfactorily distinguishing the right to freedom of expression from broader, autonomy-based arguments concerning any other aspect of individual conduct.<sup>142</sup> For if the self-fulfilment rationale is understood in terms similar to those adopted in arguments deriving from autonomy – according to which there is the implication, identified by Post and highlighted above, that, "all ideas [are] equal because all ideas equally reflect the autonomy of their speakers and because this autonomy deserves equal respect"<sup>143</sup> – then the basis for expression's special status must, without further extrapolation, be extended to uncomfortable extremes, so as to include any action that purportedly instantiates the autonomy *qua* self-fulfilment of the actor.

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<sup>138</sup> Redish (n 18) at 595. See also, Baker (n 73) at 1003: suggesting that, under the self-fulfilment rationale, the State, "must normally be agnostic in respect to [the] content or effect [of an individual's expression]."

<sup>139</sup> Greenwalt (n 112) at 145

<sup>140</sup> Schauer, F. *Free Speech: A Philosophical Enquiry*, Cambridge University Press (1982) at 58

<sup>141</sup> Schauer (n 140) at p. 58

<sup>142</sup> Barendt (n 27) at 13

<sup>143</sup> Post (n 71) at 479

Thus, if self-fulfilment is to be taken as the guiding principle in explaining the value of freedom of expression, some reason must be proffered, as Barendt is keen to emphasise, as to why *expression* is especially significant in attaining an individual's self-fulfilment.<sup>144</sup> There are, after all, a myriad of other interests – a right to adequate housing or to education are but two examples that have been suggested – that could reasonably be interpreted as promoting the development of one's self, and yet do not receive the same degree of prominence as that conferred upon the right to freedom of expression.<sup>145</sup> What's more, after surmising that the right to freedom of expression is, “essentially a right actively to participate in and contribute to the public culture,” Raz has pointed out – albeit in the capacity of something approximating a devil's advocate – that, in practice, relatively few people avail themselves of such an opportunity.<sup>146</sup> Whilst the rapid developments in technology and resulting ease with which expression can now be publicly manifested through social media may go some way towards dispelling Raz's pre-internet musings, it remains the case, as Raz indeed went on to reflect, that there are, “many other interests most people have [that] are much more valuable to them than their interest in this freedom [of expression].”<sup>147</sup>

From the preceding discussion it would therefore transpire that the self-fulfilment principle shares many of inherent difficulties facing the argument from autonomy; most notably that it proffers an uncomfortably broad scope of protection on account of its inability to explain the particular significance of expression in achieving self-fulfilment in order to distinguish expression from other actions that promote self-fulfilment. Yet, whilst it is true that one's actions may be considered to contribute to one's self-fulfilment, that supposition does not necessarily preclude recognition of the fact that, when we seek to protect expression we do so because we recognise that ‘expression’, however defined, is valuable because it engenders the self-fulfilment of the individual.

In this regard, an overview of Redish's theory of freedom of expression is particularly illuminating. In seeking to proffer a ‘major reassessment’ of free speech doctrine, Redish's primary intention was to return the discourse to first principles.<sup>148</sup> In so doing, Redish asserts that it is the notion of ‘individual self-realisation’ that forms the basis of the

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<sup>144</sup> Barendt (n 27) at 13-14

<sup>145</sup> Barendt (n 27) at 13-14

<sup>146</sup> Raz, J. *Freedom of Expression and Identification*, 11 Oxford J. Legal Stud. 303 (1991) at 304

<sup>147</sup> Raz (n 146) at 304

<sup>148</sup> Redish (n 18) at 593



fundamental value that the freedom of expression seeks to serve and from which the other rationales for freedom of expression's protection in fact ultimately derive.<sup>149</sup> As such, employing the notion of 'individual self-realisation' whilst pursuing the identification of freedom of expression's fundamental value is appealing to Redish precisely because of its ambiguity and incorporation of strands pertaining to both self-fulfilment and autonomy.<sup>150</sup> Thus, with regards to self-fulfilment, Redish's thesis recognises the 'realisation' of an individual's full potential vis-à-vis his individual development whilst simultaneously, from the perspective of autonomy, recognising that by being on control of one's decision-making process, an individual is said to 'realise' his life goals.<sup>151</sup> As such, Redish's position clearly encapsulates the significance of freedom of expression both for the speaker and for the recipients of expression.

Underpinning Redish's theory and his identification of 'individual self-realisation' being the core value from which other values associated with freedom of expression's exercise derive is his assertion that, "the moral norms inherent in the choice of our specific form of democracy logically imply the broader value, self-realization."<sup>152</sup> The conclusion that Redish's theory invites – through its synthesis of autonomy and self-fulfilment – is that, "all forms of expression that further the self-realization value, which justifies the democratic system as well as free speech's role in it, are deserving of full constitutional protection."<sup>153</sup> Whilst Redish's principle of individual self-realisation therefore presupposes that, "[a]ny external determination that certain expression fosters self-realization more than any other is itself a violation of the individual's free will," such that all expression must be considered equally valuable for constitutional purposes, it does not necessarily follow that all expression must be equally protected.<sup>154</sup> For, as Redish explains, there is, "no inconsistency in recognizing that individual self-realization is the sole value furthered by free speech and simultaneously acknowledging that, at least in extreme cases, full constitutional protection of free expression may be forced to give way to competing social concerns."<sup>155</sup> Put another way, whilst competing interests may prove determinative in curtailing expression in certain instances, it nevertheless remains the case that the

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<sup>149</sup> Redish (n 18) at 594

<sup>150</sup> Redish (n 18) at 593

<sup>151</sup> Redish (n 18) at 593

<sup>152</sup> Redish (n 18) at 594 cf. Perry, M. *Freedom of Expression: An essay on theory and doctrine*, 78 Nw. U. L. Rev. 1137 (1983-1984) at 1156-1158

<sup>153</sup> Redish (n 18) at 594

<sup>154</sup> Redish (n 18) at 594-595

<sup>155</sup> Redish (n 18) at p. 595

primary reason underlying the significance of expression, lies in its capacity to promote self-realisation.

## **1.4 THE ARGUMENT FROM DEMOCRACY**

### **1.4.1 An exposition of the Meiklejohnian position**

Described by Barendt as, “probably the most easily understandable, and certainly most fashionable, free speech theory in modern Western democracies,”<sup>156</sup> the argument from participation in democracy is most closely associated with the works of Meiklejohn.<sup>157</sup> At its essence, the Meiklejohnian position asserts that freedom of expression is a necessary condition required in order to allow citizens to properly engage with the democratic process.<sup>158</sup> Whilst Meiklejohn was writing in the specific context of the freedom of expression guarantees enshrined in the United States of America’s First Amendment his arguments remain relevant to us in our task of placing artistic expression within the particular nexus of freedom of expression under Article 10 of the ECHR, especially given that the ECHR’s judgments and underlying philosophy, based on the context from which it was established, can be seen as advancing and delimitating the boundaries of democracy itself.<sup>159</sup>

Under the First Amendment it is asserted that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In advancing his theory, Meiklejohn disputes the ‘absolutist thesis’, as prominently set out by Justice Black, who famously maintained that, “I take no law abridging to mean *no law abridging*.”<sup>160</sup> For Black, the First Amendment is clear and easily understood, as opposed to the ambiguous wording of, for instance, the 8<sup>th</sup> Amendment and its reference to

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<sup>156</sup> Barendt (n 27) at 8

<sup>157</sup> See, most notably, *Free Speech and its Relation to Self-Government*, Harper (1948) and *The First Amendment is an Absolute* [1961] Supreme Court Rev 245

<sup>158</sup> Fenwick (n 26) at 303

<sup>159</sup> See, for instance, Marks, M. *The European Convention on Human Rights and its ‘Democratic Society* (1995) 66 BYbIL 209

<sup>160</sup> Black, H. *The Bill Of Rights*, 35 New York University Law Review 882 (1960)

‘*excessive* bail’ and ‘*cruel or unusual* punishments’.<sup>161</sup> However, taking an empirical approach, Meiklejohn referred to the case law emanating from the First Amendment that clearly demonstrated that expression is not, in fact, *absolutely* protected.<sup>162</sup> In order to attribute a principled meaning to the First Amendment, and in refuting the binary position set out by Black, Meiklejohn takes a more holistic approach encompassing the Preamble, 10<sup>th</sup> Amendment and Article 1, section 2 of the Constitution.<sup>163</sup> In so doing, the conclusion that Meiklejohn elicits is that:

The First Amendment does not protect a ‘freedom to speak’. *It protects the freedom of those activities of thought and communication by which we ‘govern’.* It is concerned not with a private right, but with a public power, a governmental responsibility.<sup>164</sup>

It is this idea of the importance of ‘self-government’, then, rather than a right to speak *per se*, that lies at the heart of Meiklejohn’s philosophy of freedom of expression. As such, expression is ‘free’ only in so far as it can be said to be contributing to the achievement of self-governance. From this point of view certain similarities can be made with Mill’s search for truth *vis* freedom of expression – the value of expression being in its capacity to achieve some desired end product. Moreover, and of especial importance for present purposes, similarities can be found between the Meiklejohnian philosophy and that of the European Court of Human Rights’ interpretation of the underlying value of freedom of expression within Article 10. For instance, in the seminal case of *Handyside v. UK* it was asserted that:

The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterising a ‘democratic society’. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.<sup>165</sup>

In short, then, whilst there are undoubtedly trans-Atlantic differences in political tradition, the ethos inherent in the European Court of Human Rights’ interpretation of Article 10 can nevertheless be seen to parallel Meiklejohn’s understanding of the First Amendment in which it is asserted that Congress is forbidden from abridging speech (in addition to the press, peaceable assembly, and petition) “whenever those activities are utilized for the

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<sup>161</sup> Black (n 160) at 871-872

<sup>162</sup> Meiklejohn, A. *The First Amendment is an Absolute*, (1961) Supreme Court Review 245 at 247

<sup>163</sup> Meiklejohn (n 162) at 253-255

<sup>164</sup> Meiklejohn (n 162) at 255 (emphasis added)

<sup>165</sup> *Handyside v. UK* (1976), para. 49

governing of the nation.”<sup>166</sup> As such, in order to locate specifically *artistic* expression within the Meiklejohnian credo, it needs to be established that art and artistic expression does, in fact, have the capacity to contribute to public governance.

#### 1.4.2 Assessing the scope of the Meiklejohnian position

In response to Meiklejohn’s philosophical basis for the right to freedom of expression, it may be assumed that such a theory – with its rationale’s basis lying in the achievement of good, effective governance – will only extend to the protection of ‘political’ speech. For instance, in specifically drawing attention to the perceived limited scope of Meiklejohn’s position, Kalven pointed out that: “The people do not need novels or dramas or paintings or poems because they will be called on to vote.”<sup>167</sup> There is, for Kalven, no necessary link between artistic expression and a theory for freedom of expression attributed to the realisation of effective government. However, Meiklejohn’s defence of freedom of expression is more nuanced and far-reaching than might first be thought. Indeed, for Meiklejohn, the casting of a ballot, which might be considered as the external application of self-governance, requires citizens to acquire intelligence, integrity and sensitivity; thus ensuring a type of internal self-governance.<sup>168</sup>

Accordingly, Meiklejohn brings artistic expression further to the fore of his philosophy than an initial reading might suppose, establishing the link presumed missing by Kalven by stipulating that literature and the arts are a crucial component in the encouragement and development of qualities such as intelligence, integrity and sensitivity that are deemed so important for the meaningful self-government that underpins his general theory of freedom of expression.<sup>169</sup> Thus, underlying Meiklejohn’s assumption is the belief that:

the novel is at present a powerful determinative of our views of what human beings are, how they can be influenced, in what directions they should be influenced by many forces, including, especially, *their own judgments and appreciations*.<sup>170</sup>

In this regard, with particularly acute reference to the precise manner in which artistic expression may be said to form the population’s judgments and appreciations in the context

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<sup>166</sup> Meiklejohn (n 162) at 256

<sup>167</sup> Kalven, H. *Metaphysics of the Law of Obscenity*, Supreme Court Review (1960) 1, pp. 15-6

<sup>168</sup> Meiklejohn (n 162) at 255

<sup>169</sup> Meiklejohn (n 162) at 257

<sup>170</sup> Meiklejohn (n 162) at 262

of prompting and ensuring a strong democratic ethos, artistic expression may be found to exist within the freedom of expression discourse with relative ease. However, the consequentialist value placed by Meiklejohn on freedom of expression, with free expression being a means to an end, may still be criticised for failing to fully account for the right with specific reference to the individual; a recognition of which, it might be supposed, is crucial for a comprehensive understanding of art's value.

#### 1.4.3 Freedom of expression: a means or an end?

By noting the importance of literature in influencing people's 'judgments and appreciations' certain, albeit limited, parallels may be drawn with Scanlon's notion of individual autonomy breaking the chain of causation. Recognising that literature may be produced for a number of reasons, including even the 'tearing down' of a way of life treasure by society, Meiklejohn's position remains clear in that the First Amendment still ought not justify governmental attempts to distinguish between 'good' and 'bad' novels.<sup>171</sup> There is a crucial distinction to be made, however, between the reasoning adopted by Meiklejohn and Scanlon in reaching that same conclusion. Whereas Scanlon would consider such a role by government to infringe upon individual autonomy, Meiklejohn's theory of self-government places greater emphasis on the more limited view that the authority of citizens to decide what to write or read or see, has not been delegated to any of the subordinate branches of government.<sup>172</sup> In short, Meiklejohn's conception is largely consequentialist and, as such, is concerned more with the achievement of an end goal – democracy, than with an individual's right *per se*.

The distinction between Meiklejohn and Scanlon is further explored by Sir John Laws, in an essay entitled *Meiklejohn, the First Amendment and Free Speech in English Law*,<sup>173</sup> in which he criticises the essentially consequentialist approach endorsed by Meiklejohn. As we have seen demonstrated above, Meiklejohn is concerned, not with the interest of the individual *per se*, but with the collective, or public, interest.<sup>174</sup> Laws' essential premise is that, "Free speech is ultimately an imperative put upon us by the destiny of our freedom of

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<sup>171</sup> Meiklejohn (n 162) at 262

<sup>172</sup> Meiklejohn (n 162) at 262

<sup>173</sup> See, Loveland I. (ed) *Importing the First Amendment: Freedom of Expression in American, English and European Law*, Hart Publishing, 1998

<sup>174</sup> See Laws, J. *Meiklejohn, the First Amendment and Free Speech in English Law*, in Loveland I. (ed) *Importing the First Amendment: Freedom of Expression in American, English and European Law* at 127

thought.”<sup>175</sup> For Laws therefore, freedom of expression is an *individual* right, rather than collective. Thus, whilst free speech will often flourish under regimes of democracy and self-government, it is simultaneously distinct. As Laws asserts, “it is our freedom that demands democracy, and not the converse.”<sup>176</sup> Laws’ concerns with Meiklejohn’s collective approach are similarly shared by Dworkin. As a tool of constitutional implementation, Dworkin puts forward his ‘moral reading’ approach under which, in light of the US Bill of Rights, “government must treat all those subject to its dominion as having equal moral and political status.”<sup>177</sup> Accordingly, the US Constitution is to be understood as a set of moral principles, affording protection to *individual* rights with each individual’s expression to be respected on the basis of their equal politico-moral standing.

The relationship between the individual and the state has, of course, been the subject of a long-standing debate. Whilst a comprehensive discussion of this relationship lies out with the scope of the present thesis’ inquiry, it suffices to say that tensions do emerge from the the protection of individual rights that are seen as offending popular will or, put another way, ‘democracy’. Yet, without appealing to notions of individual rights, the outcomes of cases like the desegregation of schools are difficult to explain. For in such instances the Supreme Court is seen to be usurping the will of the majority. As Dworkin points out, the segregation of schools was, after all, permitted by law, and would have been admitted by the Constitution’s drafters.<sup>178</sup> In turning to the question of freedom of expression in particular, Barendt’s criticism of Meiklejohn’s position becomes ever more pertinent:

If the maintenance of democracy is the foundation for free speech, how is one to argue against the regulation or suppression of that speech by the democracy acting through its elected representatives?<sup>179</sup>

Dworkin’s response to these constitutional aspects of individual liberty or rights is to reframe our current understanding of democracy, and in-so-doing ask whether we ought to accept or reject what he calls the ‘majoritarian premise.’<sup>180</sup> Lying at the heart of the ‘majoritarian premise’ of democracy is the question of whether a given decision is agreeable to the majority of citizens.<sup>181</sup> In rejecting this approach, Dworkin shifts the debate

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<sup>175</sup> Laws (n 174) at 136

<sup>176</sup> Laws (n 174) at 136

<sup>177</sup> Dworkin, R. *Freedom’s Law: The Moral Reading of the American Constitution*, Harvard University Press (1996) at 7-8

<sup>178</sup> Dworkin (n 177) at 13-14

<sup>179</sup> Barendt (n 27) at 19

<sup>180</sup> Dworkin (n 177) at 15

<sup>181</sup> Dworkin (n 177) at 15-6

away from the consequentialist understanding of democracy and towards an understanding of democracy that seeks to treat individuals with “equal concern and respect.”<sup>182</sup> Thus, whilst Dworkin’s model relies on the same political institutions and structures as proponents of the majoritarian premise, there is a distinct difference in the *value* or *purpose* that democracy ought to endeavour to achieve.

Dworkin’s approach is given more resonance when one considers the point of view, set out by Bollinger, that what Meiklejohn puts forward is not a ‘theory’ of free speech *per se* but is rather a “rhetorical effort to persuade us to become the sort of people [he] would like us to be.”<sup>183</sup> Accordingly, Meiklejohn is stipulating something more than simply when expression may be legitimately curtailed. Instead, the end being sought is more appropriately described as a general ‘identity’, such that the First Amendment is seen to embody an intellectual life and the pursuit of collective welfare.<sup>184</sup> There is, therefore, a paradox, which according to Laws has been conflated by Meiklejohn, between democracy as an end in itself, and democracy as a means towards man’s realisation of being a free and rational person.<sup>185</sup>

#### **1.4.4 Bringing the argument from democracy within the domain of the individual**

James Weinstein has attempted to reformulate Meiklejohn’s argument from participatory democracy, so as to place the value of freedom of speech in democracy squarely within the domain of the individual. In so doing, Weinstein’s formulation would likely appeal more to Dworkin in that it alleviates the tension outlined above between considering democracy as a means or an end.<sup>186</sup> For Weinstein, the argument from participatory democracy, “embraces an uncontestable [sic] right of each individual to free and equal participation in the political process, including the public discussion by which our society’s laws, policies, and norms are evaluated.”<sup>187</sup> In defending this approach, Weinstein maintains that his theory is both descriptively powerful (in that it most accurately reflects the jurisprudence of the United States’ Supreme Court) and, more importantly for present purposes, that it is

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<sup>182</sup> Dworkin (n 177) at p. 17

<sup>183</sup> Bollinger, L. *The Tolerant Society*, OUP (1986) at 154-158

<sup>184</sup> Bollinger (n 183) at 154-158

<sup>185</sup> Laws (n 174) at 129

<sup>186</sup> Weinstein, J. *Participatory Democracy As The Central Value of American Free Speech Doctrine*, 97 *Virginia Law Review* 491 (2011)

<sup>187</sup> Weinstein (n 186) at 505

most normatively attractive (since it is rooted in a value that it is supposed that everybody can accept).<sup>188</sup>

Weinstein asserts, as is commonly accepted, that not all expression is (or even ought to be) protected. With particular reference to the First Amendment he goes on to maintain that, rather than protection being ‘all-inclusive’, subject to a limited number of expressions, the converse is actually true of the Supreme Court’s jurisprudence. On this understanding, protected speech is seen as the exception, with most forms of expression been subject to regulation.<sup>189</sup> More specifically, for Weinstein, the expression that is most highly protected falls under the category of ‘public discourse’.

From this, Weinstein deduces that since the most rigorous protection found under the First Amendment is that of ‘public discourse’, the most relevant core value attributable to that protection is democratic self-government. Weinstein asserts this almost through a process of elimination, discounting the other theories of freedom of expression as merely eliciting (at best) peripheral values. Accordingly, the search for truth cannot be considered a core value for Weinstein on the grounds that its premise is rested on the highly contested assumption that truth will prevail from unregulated speech and for its consequentialist philosophy under which free speech is justified on a collective, rather than individual, basis.<sup>190</sup> Furthermore, arguments from what Weinstein describes as the, “cluster of norms comprising individual autonomy, self-expression, or self-fulfilment,” cannot, so Weinstein asserts, be considered as a core value underlying the protection of speech largely because such a theory would, as noted in the critique of the Scanlonian position in section 1.3.2 above, be too broad in its coverage of what most people would consider to be expression worthy of protection.<sup>191</sup> Indeed, with regards to the autonomy based arguments, Weinstein expounds on Scanlon’s retraction of much of his argument found in *A Theory of Freedom Of Expression*, saying that his principle was “too strong and too sweeping to be plausible.”<sup>192</sup> However, noting Scanlon’s previous assertion that the First Amendment forbids regulations “which appeal to the fact that it would be a bad thing if the view communicated by certain acts of expression were to become generally believed,”<sup>193</sup>

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<sup>188</sup> Weinstein (n 186) at 491

<sup>189</sup> Weinstein (n 186) at 492

<sup>190</sup> Weinstein (n 186) at 502

<sup>191</sup> Weinstein (n 186) at 502-504

<sup>192</sup> Scanlon (n 97) at 532

<sup>193</sup> Scanlon (n 80) at 209



Weinstein goes on to argue that, whilst certainly too sweeping, it is not necessarily too strong provided that it be applied only to ‘public discourse’.<sup>194</sup>

Fundamental to Weinstein’s position therefore, is the belief that only expression of a certain quality (ie. public discourse) is to be protected. Implicit in Weinstein’s partial criticism of Scanlon is that basing a defence of freedom of expression on an argument on autonomy would expand the scope of protection to such a point as to ultimately dilute that expression most in need of immunity from suppression.<sup>195</sup> This would appear to be also true under Redish’s autonomy-based assertion that “all forms of expression are equally valuable for constitutional purposes,” subject to a degree of balancing with competing social norms. According to Weinstein, such an approach would endanger the protection of the most valuable types of expression, including controversial expression currently immune under the First Amendment as well as inviting judicial bias to enter the equation.<sup>196</sup>

Underpinning Weinstein’s entire thesis, and especially evident in the last point, is the question of whether the judiciary ought to be able to invalidate those democratically enacted laws that seem to encroach on freedom of expression. The argument from participatory democracy can therefore be seen as offering less of a constitutional problem than, particularly, arguments from autonomy since, by applying the argument from participatory democracy, the judiciary would, in finding certain legislation or executive actions to violate freedom of expression, be merely upholding the core value of individual participation in the political process that is seen to underlie the entire philosophy of the American Bill of Rights. Similarly, the recognition in *Handyside* that freedom of expression constitutes, “one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man” can be seen as promoting the Weinsteinian philosophy in the context of the European Court of Human Rights’ jurisprudence.

Of course, ‘public discourse’ itself would seem to be an ambiguous term. Its limits are not clear, though one suspects that Weinstein has in mind quite a narrow conception, limiting expression’s protection to that approximating political discourse. Indeed, the definition of ‘public discourse’ provided by Weinstein – “speech on matters of public concern, or,

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<sup>194</sup> Weinstein (n 186) at 509

<sup>195</sup> Weinstein (n 186) at 509-510

<sup>196</sup> Weinstein (n 186) at 510-11

largely without respect to its subject matter, of expression in settings dedicated or essential to democratic self-governance”<sup>197</sup> – is, for Baker, too narrow.<sup>198</sup> Whilst Weinstein confirms that expression in the form of books and films do form a basis of democratic self-governance, in recognising that his principle has difficulty in being applied to abstract art or symphonic music is indicative of Weinstein’s commitment to furthering the protection of ‘political’ expression (broadly construed).<sup>199</sup> As Scanlon notes, from the frequency with which Weinstein refers to ‘democracy’ it might be natural to infer that the underlying value attributed to freedom of expression – that is to say, “speech by which we *govern* ourselves,”<sup>200</sup> – may be limited to expression pertaining to governance *qua* democratic political institutions.<sup>201</sup>

To further emphasise the potential limitations of Weinstein’s thesis, Scanlon goes on to imagine a scenario in which the state sought to ban the film *Brokeback Mountain*. Such a move would undoubtedly violate the right to freedom of expression but the basis of that violation would not, Scanlon suggests, rest solely on the fact that the issues raised in the film – gay rights and marriage, for instance – form potential subject matters for legislative or constitutional change.<sup>202</sup> In other words, the value of *Brokeback Mountain*’s (artistic) expression need not be recognised only in terms of its ability to contribute to ‘political’ discourse, as a narrow reading of Weinstein might suppose. Rather, its value as expression may better be understood, as Scanlon submits, in terms of our, “interest in participating in the process of determining how our informal social mores will evolve and our interest in deciding for ourselves how to conduct our private lives.”<sup>203</sup>

Yet, to the extent that art *is* recognised as being able to contribute to public discourse, Weinstein’s position proffers a strong foundation from which to assess the adequacy of its protection. For Post – whose autonomy-based argument from democracy is broadly similar to that of Weinstein, differing primarily only on grounds of precisely what constitutes participation<sup>204</sup> – “[a]rt and other forms of non-cognitive, non-political speech fit

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<sup>197</sup> Weinstein (n 186) at 493

<sup>198</sup> Baker, E. *Is democracy a sound basis for a free speech principle?*, 97 Va. L. Rev. 515 (2011) at 517

<sup>199</sup> Weinstein (n 186) at 499 fn. 45

<sup>200</sup> Weinstein (n 186) at 491 (emphasis added)

<sup>201</sup> Scanlon (n 81) at 545

<sup>202</sup> Scanlon (n 81) at 545

<sup>203</sup> Scanlon (n 81) at 545

<sup>204</sup> Baker (n 198) at 515

comfortably within the scope of public discourse.”<sup>205</sup> Thus, for Post, “[p]ublic discourse depends upon the maintenance of a public sphere, which is a sociological structure that is a prerequisite to the formation of public opinion,”<sup>206</sup> hence the strong presumption in favour of protecting the expression of, say, newspapers. However, under Post’s construction, even expression that is not traditionally considered to relate to ‘public discourse’ is still worthy of protection when it, “conveys information or knowledge that is valuable for the formation of public opinion.”<sup>207</sup> As such, it is art’s, “connection to public opinion formation in a democracy,”<sup>208</sup> that warrants its protection under Post’s thesis.

Nonetheless, by outlining the position posited by Weinstein, with its emphasis on expression’s furthering of democracy and ‘public interest’, it is hoped that a more comprehensive framework will have been established from which to explore the European Court of Human Rights jurisprudence both in terms of its approach to categorising expression (see Chapter Three, *infra*, in which it will be suggested that the categorisation of expression and subsequent levels of protection afforded thereafter is intimately related to the proximity to which the expression in question is perceived to relate to Article 10’s core value(s)) and its treatment of specifically artistic expression in its Article 10 case law (see Chapter Four, *infra*)

## 1.5 **CONCLUSIONS**

It is not the intention of this thesis to advance a novel theory of freedom of expression justifying the inclusion of artistic expression. Instead, it is hoped that in recognising the distinctive qualities of art as a *sui generis* form of expression – a position that will be explored further in the following chapter – artistic expression may be seen, to a greater or lesser extent, to fit *within* the pre-existing philosophies. Thus, to the extent that the values of artistic expression *can* be seen to align with the principal theories of freedom of expression’s identification of the values of freedom of expression in general (and the values of Article 10 in particular) then a case may begin to emerge for artistic expression’s greater

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<sup>205</sup> Post (n 71) at 486

<sup>206</sup> Post (n 71) at 486

<sup>207</sup> Post (n 71) at 486: It is important to stress the qualification posited by Post, in which it is asserted that expression which is not ‘public discourse’ yet which is still considered valuable for its contribution to the formation of public opinion is, according to Post, only to be understood in terms of the autonomy of the listener and not that of the speaker.

<sup>208</sup> Post, R. *Participatory democracy as a theory of free speech: A reply*, 97 Va. L. Rev. 617 (2011) at 620

protection within Article 10. In order to achieve this, an initial survey of the landscape of thought concerning freedom of expression was therefore unavoidable.

From the preceding discussion one might be tempted to agree with Raz's assertion that, "[f]reedom of expression is a liberal puzzle. Liberals are all convinced of its vital importance, yet why it deserves this importance is a mystery."<sup>209</sup> The mystery of identifying expression's underlying value is seemingly compounded by the variety of positions advocated. As we have seen, expression's value has been identified in its promotion of truth, for guaranteeing autonomy and/or the achievement of self-fulfilment and for its significance in the democratic process. It might therefore be supposed, in line with Blasi's assessment of free speech, that, "the commitment to free expression embodie[s] a complex of values."<sup>210</sup> Redish would, however, disagree. Indeed, underpinning his thesis is the proposition that there is no such complex of values but, rather, one fundamental value – that of individual self-realisation – from which all other values derive.<sup>211</sup> Nonetheless, to the extent that the derivative values – termed 'sub-values' under Redish's analysis – promote individual self-realisation, they remain of value and significance in explaining the significance of freedom of expression.<sup>212</sup> Thus, according to Redish, to the extent that argument from truth may be considered as a means of enabling an individual to access the information he requires to achieve his self-realisation, Mill's thesis may be regarded as being a sub-value of the core value of individual self-realisation.<sup>213</sup> Indeed, as we have seen, Blasi's interpretation of *On Liberty* promotes just such an approach.

Redish's thesis is therefore particularly attractive for endowing specifically artistic expression with a strong foundation for protection. For intuitively artistic expression would seem to be intimately connected with one's self-realisation, whether in terms of the artist producing the work or in the audience's appreciation of the work. However, whilst expression may embody a variety of values, that is not to say that we must identify one sole value or reason underlying expression's significance.<sup>214</sup> Indeed, for Emerson, each of the traditional principles of expression are insufficient, on their own terms, in fully explaining

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<sup>209</sup> Raz (n 146) at 303

<sup>210</sup> Blasi, V. *The Checking Value in First Amendment Theory*, (1977) Am. B. Found. Research J. 521 at 538

<sup>211</sup> Redish (n 18) at 594

<sup>212</sup> Redish (n 18) at 594

<sup>213</sup> Redish (n 18) at 617-618

<sup>214</sup> For criticism of Redish's position see, for instance, Koppelman (n 109) and Alexander, L. *Redish on Freedom of Speech*, 107 Northwestern University Law Review 593 (2013)

the value that is attributed to freedom of expression. Thus, whilst each principle proffers a distinct value, the principles nevertheless remain interdependent.<sup>215</sup>

Recognising the relationship between the different values – whether in terms of being derivative of Redish’s individual self-realisation or Emerson’s interdependency of the principles – will be of vital importance in locating artistic expression’s positioning within the broader discourse. In light of the preceding discussion, in order to successfully bring artistic expression firmly within the freedom of expression discourse a number of aspects will need to be addressed in the following chapter concerning the prevailing schools of thought surrounding the theory of art. Primarily, in determining that artistic expression is, indeed, expression for the purposes of the right to freedom of expression it will need to be adduced that art, both as an individual right and as a collective good, has the specific capacity to contribute, in some sense, to general public discourse, whether that be in the sense of a Millian interpretation of ‘discussion’ versus ‘positive instigation’ capable of denying the stagnation of public thought or the Meiklejohnian-Weinsteinian-Postian approach of contributing to effective self-governance. Similarly, the extent to which art is seen to promote an individual’s self-realisation, and the relationship this has within a democratic society will be of significance. Moreover, in determining the precise nature of art and artistic expression and the way in which it may be said to align with these values, the nature of the potential harm following from controversial art may, too, be more thoroughly assessed. With the context set, the following chapter will begin to shed more light on the nature of art and allow us to more comprehensibly locate artistic expression within the freedom of expression paradigm.

Just as Cinderella’s fortunes changed so dramatically upon Prince Charming’s realisation that the glass slipper perfectly fitted her foot, so too must we establish that artistic expression, the ‘Cinderella of liberties’, can be seen to fit within the freedom of expression paradigm. As such, the extent to which this is possible may, it is suggested, account for the relatively low degree of protection historically afforded to artistic expression under the European Convention on Human Rights whilst, conversely, it will be suggested that a greater appreciation of the *sui generis* nature of artistic expression located within the framework of established thought on freedom of expression will enable the European Court of Human Rights to approach the subject in a more nuanced manner in the future.

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<sup>215</sup> Emerson, T. *First Amendment Doctrine and the Burger Court*, 68 Calif. L. Rev. 422 (1980) at 423

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## **CHAPTER TWO**

### **THEORIES OF ART**

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#### **2.1 INTRODUCTION**

In order to establish a strong, holistic framework underpinning a theoretical and doctrinal justification for artistic expression's location within the generalised theories pertaining to the freedom of expression discourse it is necessary to seek to establish a correlation between the predominant themes to have emerged in Chapter One's survey of the freedom of expression literature and the prevailing schools of thought concerning the theory of art. Thus, in essence, in addition to establishing that artistic expression promotes one's self-fulfilment, it needs to be demonstrated that expression through artistic media does, in fact, have the capacity to communicate something and is capable of contributing to something akin to public discourse. More specifically, and whilst the practical ramifications of Article 10's wording will be further discussed later with regards to the European Court of Human Rights' treatment of artistic expression, it suffices to say, for now at least, that in order to locate artistic expression firmly within Article 10's sphere of potential protection it must be established that artistic expression may be said to amount to the conveyance of 'information and ideas'.

Moreover, as important as the demonstration of artistic expression's capacity to engage in what may loosely be referred to as a 'marketplace of ideas' is, it is the distinct way in which artistic expression may be said to make such contributions that is perhaps of an even greater and more fundamental import. Indeed, an appreciation of this unique relationship between artistic expression, art and society and the inherent tensions that lie therein, may go some way towards explaining the relatively low level of protection afforded to artistic expression under Article 10 of the European Convention on Human Rights that will be discussed more thoroughly in Chapter Four of this thesis. As such, by attempting to effectively synthesise the distinct strands emerging from both the philosophy of freedom of expression and of the theory of art, with specific reference being made to the theories pertaining to formalism, expressivism and aesthetic cognitivism, a foundation will be established upon which artistic expression's location within freedom of expression discourse is comprehensibly

justified and from which a more nuanced analysis of the European Court of Human Rights' case law may be pursued that not only allows for an understanding of artistic expression's historically low level of protection but may also, more constructively, encourage the doctrinal strengthening of its position in the future.

## **2.2 FORMALIST THEORIES OF ART**

### **2.2.1 The emergence of formalism**

At their persuasive height in the early 20<sup>th</sup> century, formalist theories of art may be distilled down to the notion that the predominant value of art lies not in the representational content depicted in the artwork but, rather, in the artwork's form; that is to say, for instance, the relationship between, and use of, lines and colours. Accordingly, the formalist school of thought may be considered as a continuation of the Kantian philosophy and the ensuing bohemian and Romantic movements with their basis in the notion of *l'art pour l'art* or 'art for art's sake'.

The basis of Kant's aesthetics rests in his description of beauty being 'purposiveness without purpose'. Taking the rose as an example, Kant proffered that whilst the flower does have a purpose (namely to reproduce new roses) that is not why we would consider it to be beautiful. Instead, the rose's beauty lies in its colours and textures – its internal harmony – the combination of which is said to satisfy our emotions, imagination and intellect, prompting us to intuitively know that the object is 'just right' and thereby 'beautiful'. Thus, a certain level of disinterestedness is required on the part of the viewer if one is to appreciate only the form and design of an object rather than its base purpose. Indeed, taking a strawberry as another example, its beauty would be contaminated if one were to be so taken by its smell and texture that one decided to eat it for that would be to appreciate its purpose, rather than simply its form and design.

For Kant then, beauty is detached from knowledge and purpose – the viewer, when contemplating art, having to adopt a stance of 'disinterestedness' – such that the beautiful is necessarily incapable of conveying ideas. There is, therefore a particular freedom involved. As Nahmod highlights, "in freeing art from knowledge and desire, Kant frees the artist and viewer from their rules: [Kant] thus asserts that man is most free when creating

and contemplating art.”<sup>216</sup> Furthermore, the freedom emanating from art is considered to be unifying in the sense that, not only is art internally harmonious, but that a subjective universality exists whereby all ‘cultivated’ persons may agree upon what is beautiful. Yet, whilst promoting a degree of societal harmony, the freedom from knowledge and purpose of art entails, simultaneously, an undermining of the impact upon the relationship between art and society; a conclusion that may be seen in greater detail with regards to the formalist school of thought below.

Kant’s ‘purposiveness without purpose’ may be seen in the expression *l’art pour l’art* – or ‘art for art’s sake’ – which acted as an essential mantra of the Romantic and bohemian movements of the 19<sup>th</sup> century. Often traced back to Benjamin Constant’s assertion, in the opening years of the 19<sup>th</sup> century, that “*L’art pour l’art* without purpose, for all purpose perverts art,” the ‘art for art’s sake’ movement considered the value of art to lie solely *within* the work in question. That utility was seen to preclude beauty and art was of paramount importance to Theophile Gautier who wrote, in the preface to his work *Premières poesies*, “What end does this book serve? - it serves by being beautiful. In general as soon as something becomes useful it ceases to be beautiful”. Writing in 1832, a period in French history in which art was constrained by religious, social and political forces, Gautier’s attempt to diminish the relationship between art and society is understandable. Similarly, Oscar Wilde’s assertion, made in the preface to *The Picture of Dorian Gray* that, “there is no such thing as a moral or an immoral book. Books are well written or badly written,” so as to, again, bring the value of the art solely within the work itself, has been considered as an attempt to legitimize morally controversial works.<sup>217</sup>

Possible socio-historic reasons aside, the Kantian tradition of ‘purposiveness without purpose’ *qua* disinterestedness, as developed through the Romantic and bohemian movements acknowledging *l’art pour l’art*, set the basis from which the formalist school of thought emerged, in which the sole value of significance of art pertain to the formal qualities of art rather than any, wider, societal value.

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<sup>216</sup> Nahmod, S. *Artistic Expression and Aesthetic Theory: The beautiful, the sublime, and the First Amendment* Wis. L. Rev. 221 (1987) at 231

<sup>217</sup> See, for instance, Dowling, *Aesthetic Formalism*, Internet Encyclopaedia of Philosophy, available at <http://www.iep.utm.edu/aes-form/> (accessed 18<sup>th</sup> October 2015)



### 2.2.2 Clive Bell's formalism

It has been noted that the philosophy advanced by Clive Bell in his seminal work *Art*<sup>218</sup> in 1914 was a reaction to the then contemporary developments in the art world, as opposed to a catalyst *for* such developments.<sup>219</sup> In particular, it has been suggested by Nigel Warburton that Bell's intention in writing *Art* was largely to establish a thesis defending the post-impressionist works of Paul Cezanne which marked a shift away from the impressionism of the 19<sup>th</sup> century and paved the way for early 20<sup>th</sup> century cubism.<sup>220</sup> Nevertheless, in conjunction with Bell's particularised defence of Cezanne a generalised theory of art emerged, according to which the predominant value of art was identified as lying in its form.

Whilst Bell's thesis is today largely out of favour within the realm of art theorists, *Art* remains influential in so far as it aligns with at least some of our intuitions about the nature and value of art. Indeed, there are few accounts of the values, definitions or ontology of art that fail to refer to Bell's contribution to the philosophy of art. As such, the extent to which Bell's formalist philosophy may be said to accurately define or represent art, therefore, is of considerable import in this thesis' attempt to locate artistic expression within the freedom of expression paradigm. If, as Bell submits, the value of art lies predominantly in the relationship between lines and colours it would seem to be facetious, if not conceptually impossible, to maintain that artistic expression has the capacity to convey 'information and ideas' of the type associated with a high level of protection in the European Court of Human Rights' Article 10 case law or, similarly, to align itself with the underlying philosophies pertaining to freedom of expression as outlined in Chapter One of this thesis. That there have been some recent attempts to revive Bell's formalist philosophy in the early 21<sup>st</sup> century only adds to the significance of our inquiry.

So far, and with reference to the formalist school in general, we have established, somewhat crudely, that the key attribute of art for Bell is that of 'form' as opposed to, say, representation or content. However, such a description is insufficient in its simplicity on the grounds that anything and everything may be said to have 'form' of some kind. If 'form' *simpliciter* were the defining characteristic of art there would, after all, be little to

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<sup>218</sup> Bell, C. *Art*, Chatto & Windus (1914)

<sup>219</sup> Warburton, N. *The Art Question*, Routledge (2003) at 18

<sup>220</sup> Warburton (n 219) at 9

differentiate art from cars, maps or lamps. Put another way, there would be nothing *distinctive* about a still life artwork and the physical, tangible objects depicted therein, when our intuitions would surely suggest otherwise. Instead, the ‘form’ underpinning the value of art that was advanced by Bell in *Art* was that of ‘significant form’. For Bell, then, the single unifying feature applicable to all art – from the windows of Chartres Cathedral to the works of Cezanne – is ‘significant form’, which is further defined as, “lines and colours combined in a particular way, certain forms and relations of forms, [that] stir our aesthetic emotions.”<sup>221</sup>

The distinction, then, between form *simpliciter* and significant form is that, whilst the former may well interest or amuse us, the latter has the greater, more highly valued, ability to provide the viewer with, what one commentator has described as, a ‘quasimystical inkling of ultimate reality.’<sup>222</sup> According to Bell’s theory, art – through the successful use of significant form – has the capacity to transport us, “from the world of man’s activity to a world of aesthetic exaltation. For a moment we are shut off from human interests; our anticipations and memories are arrested; we are lifted above the stream of life.”<sup>223</sup> Likening the state of mind provided under this significant form induced aesthetic emotion to that of a ‘mathematician rapt in his studies’, the formalist theory of art advanced by Bell in *Art* would therefore appear to undermine any notion of artistic expression being expression, more commonly understood, for the purposes of freedom of expression discourse. Accordingly, whilst art may be said to convey *something* – in the sense that, as Carol Gould has suggested, Bell’s ‘aesthetic emotion’ is, in essence, the pleasurable reaction to a perceptual experience<sup>224</sup> – it would seem far-fetched to assume that art’s capacity to prompt a ‘pleasurable reaction’ could therefore qualify such a transmission as expression for the purposes of locating it within the freedom of expression paradigm.

To highlight the spurious nature of the reasoning required to bring Bell’s theory of art within the confines of the freedom of expression discourse let us consider the London Underground map. As Stephen Grant suggests, when looking at a map of the London Underground, one may be struck by a certain admiration for the ingenious way in which a complex transport system has been represented but it would, however, be a stretch to

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<sup>221</sup> Bell (n 218) at 5

<sup>222</sup> Stecker, R. *Value in Art* in Levinson, J. (ed) *The Oxford Handbook of Aesthetics*, Oxford University Press (2005) at 312

<sup>223</sup> Bell (n 218) at 27

<sup>224</sup> Gould, C. *Clive Bell on Aesthetic Experience and Aesthetic Truth*, 34 *British Journal of Aesthetics* 124 (1994) at 124

suppose that that person had been *moved* by the map, in the same way as one might be by a work of art.<sup>225</sup> The reason that we are not moved by the map of the London Underground, according to Bell's thesis, then, is because it lacks significant form. Conversely, however, Stephen Grant concedes that it is at least conceivable to imagine a beautiful map that we *do* find aesthetically appealing before stressing that the reason *why* we find it aesthetically beautiful would be because of its aesthetic properties rather than because of its properties as a map.<sup>226</sup> Something could logically, therefore, be a useless map, riddled with inaccuracies but, through its use of lines and colours, be aesthetically appealing, in the sense that Bell advances.

Suggesting, therefore, that art has the capacity to convey either information or ideas, of the sort recognized as befitting a high degree of protection under Article 10 of the European Convention on Human Rights or contribute to public discourse under the Meiklejohnian/Weinstein position, is therefore problematic under Bell's thesis. Whilst Bell concedes that one *might* look to Cezanne's landscapes in order to extract information about the lay of the land that is not the reason why one would label the landscape as a work of art or where one would seek to assert art's value. Indeed, for Bell, "every sacrifice made to representation is something stolen from art,"<sup>227</sup> further indicating why we ought not to rely on Cezanne's works if we were to find ourselves lost in the French countryside and diminishing the possibility with which one might say that art can convey information and ideas. Instead, as highlighted above with reference to the London Underground map, what makes a given work 'art' is the work's ability, through the artist's successful employment of significant form, to *move* us, not merely to inform us.

Moreover, there is, underlying Bell's thesis, inevitably a degree of detachment between art and society that is reminiscent of the Kantian notion of disinterestedness. Thus, in order to appreciate significant form, and therefore art, Bell stipulated that, we 'need bring with us nothing from life, no knowledge of its ideas and affairs, no familiarity with its emotions.'<sup>228</sup> As Christopher Dowling surmises, "the significance in question [regarding significant form] is a significance unrelated to the significance of life."<sup>229</sup> Indeed, it is here that the

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<sup>225</sup> Grant, S. *Formalism in the philosophy of art*, The Richmond Journal of Philosophy, available at: [http://www.richmond-philosophy.net/rjp/rjp19\\_grant.php](http://www.richmond-philosophy.net/rjp/rjp19_grant.php) (accessed on 14th October 2015)

<sup>226</sup> Grant (n 225)

<sup>227</sup> Bell (n 218) at 44

<sup>228</sup> Bell (n 218) at 25

<sup>229</sup> Dowling, Internet Encyclopaedia of Philosophy, *Aesthetic Formalism*, available at: <http://www.iep.utm.edu/aes-form/#H1>

quasi-mysticism of the realm of Bell's aesthetic emotion, noted by Stecker above, comes especially to the fore, with Bell claiming that, "[i]n [the aesthetic] world the emotions of life find no place. It is a world with emotions of its own."<sup>230</sup> Establishing a convincing corollary between the real world's, or at least the European Court of Human Rights', implicit preference for expression constituting the conveyance of information and ideas and Bell's aesthetic world, consisting of its own distinct, but ultimately vague, emotions is, once more, conceptually difficult, if not impossible.

### 2.2.3 Criticisms of Bell's formalist theory of art

As Stecker has noted, Bell's theory, "hinges on his ability to identify not just form, but significant form, and many have questioned whether he is able to do this in a non-circular fashion."<sup>231</sup> The circularity stems from the foundation of Bell's thesis resting on two key terms – significant form and aesthetic emotion – both of which are defined purely in terms of the other.<sup>232</sup> Thus, significant form is the arrangement of lines and colours in such a way that evokes an aesthetic emotion; and aesthetic emotion is that state of mind produced by the artist's successful rendering of lines and colours in such a way that establishes significant form. Moreover, stemming from the circularity with which Bell's thesis depends, there is credence in Warburton's assertion that the theory posited in *Art* does little more than seek to elevate Bell's subjective, individual taste in to an objective ideal.<sup>233</sup> For instance, suppose that upon observing Picasso's *Guernica* I fail to find myself in a state of aesthetic ecstasy. The logical conclusion to draw, under Bell's thesis, would be that *Guernica* is therefore not art, yet such a conclusion would clearly be counter-intuitive. The sufficiency of Bell's formula regarding significant form and aesthetic emotion is, as such, wanting.

Yet, even if we were to accept that Bell *was* successful in identifying and defining 'significant form', the thesis put forward in *Art* would remain, according to his critics, inadequate as a sufficient, overall theory of art. The fundamental problem with Bell's theory, as is the case with formalism more generally, lies in its exclusion of all the other properties of art that we might recognize as being of value.<sup>234</sup> Specifically, Bell's insistence

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<sup>230</sup> Bell (n 218) at 28

<sup>231</sup> Stecker, R. *Definition of Art*, in Levinson, J. (ed) *The Oxford Handbook of Aesthetics*, Oxford University Press (2005) at 141

<sup>232</sup> Warburton (n 219) at 22

<sup>233</sup> Warburton (n 219) at 20

<sup>234</sup> Stecker (n 222) at 312

on the formal qualities of an artwork overlooks the representational aspects of art and, indeed, the knowledge that one might extrapolate from such representation. Moreover, Stecker submits that Bell's dismissal of representation is inadequate for two reasons.<sup>235</sup> Firstly, Bell's dismissal is based on the notion that the viewer is taking an interest solely in the subject that is being depicted. Thus, whilst Stecker accepts that it is unlikely that, when looking at a landscape painting, our central interest would lie in the depiction as a source of reference, in the way that we might consult a map, we might nevertheless be interested in such factors as the choice of subject, the way in which the scene is depicted, as well as the attitude expressed towards the subject (or more generally towards nature or humanity), all of which concern the representation of the artwork and not simply its form.<sup>236</sup> As Stecker maintains, "[i]f we can take this sort of interest in a represented scene, and if paintings can reward such interest, it is implausible to exclude this from the artistic value of such works."<sup>237</sup>

Secondly, with reference to Vermeer's *A Woman Weighing Gold*, whilst the painting may be considered in wholly formal terms, in which the light coming through the window and illuminating part of the room may be considered as a division of both the two-dimensional surface and the represented space of the painting, this same division is also of symbolic and therefore of representational significance.<sup>238</sup> Thus, to rely solely on form in the identification of artistic value is too restrictive a method that ultimately, according to Stecker, runs the counter-intuitive risk of undermining and diminishing the value and significance of form.

Accordingly, Bell's formalist theory of art has, in large part, been dismissed, leading Warburton to maintain that *Art*, "read[s] more like nostalgia for a time when aesthetic considerations were central to all works of art, rather than as [a] definition of what art is now."<sup>239</sup> In order to account for more recent developments in the art world it would therefore appear that a theory outlining the value of art and, by implication, of what we mean by artistic expression, must include more than simply the internal lines, shapes and colours of a work. That such a theory must be sought is especially important if we are to succeed in locating specifically artistic expression within the broader nexus of the

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<sup>235</sup> Stecker (n 222) at 312

<sup>236</sup> Stecker (n 222) at 312

<sup>237</sup> Stecker (n 222) at 312

<sup>238</sup> Stecker (n 222) at 312

<sup>239</sup> Warburton (n 219) at 35

philosophy of freedom of expression, requiring, as a minimum, the expression of *something*.

## 2.3 EXPRESSIVIST THEORIES OF ART

### 2.3.1 Background

Whilst there is considerable conceptual difficulty in synthesizing the formalist theories of art – with their focus on the internal, formal qualities of an artwork – and the underlying philosophies concerning freedom of expression, with Article 10's notions of expression conveying 'information' or 'ideas', by turning to expressivist theories of art we may begin to see a more natural relationship emerging. Before turning to the key proponents of the theory of expression, however, it is important to first define what we mean by the term 'art as expression.' A distinction must, for instance, be made between 'expression' and 'representation'; the former being concerned with the conveyance of moods, emotions or attitudes, whilst the latter seeks to represent (or re-present) such things as society, nature and the human form.<sup>240</sup>

As such whilst it is possible for there to be expression and representation present, simultaneously, within a work, it is not *necessarily* so; such that the underlying value of art, according to the expressivist theory, lies predominantly in the expressive qualities of a given work – that is to say, the success with which an artist might be said to have expressed an 'emotion'. Indeed, one need only think of abstract art or instrumental music to confirm the supposition that there can be expression without representation. Moreover, expressivism is very widely accepted, such that few would deny that expression is, at the very least, *one* value attributable to art even if others would proffer additional values as having greater significance.<sup>241</sup> As such, the area of most significant contention regarding expressivism centres on how 'expression' is best defined. As we shall discover, the particular way in which 'expression' is so defined will profoundly affect our understanding of artistic expression within the freedom of expression paradigm. It is to this exposition that we now turn.

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<sup>240</sup> Stecker (n 231) at 138

<sup>241</sup> Ridley, A. *Expression in Art*, in Levinson, J. (ed) *The Oxford Handbook of Aesthetics*, Oxford University Press (2005) at 211

### 2.3.2 Outlining Collingwood's expressivist theory

Perhaps the most enduring and oft-cited definition of the expressivist theory of art emanates from R. G. Collingwood's *Principles of Art*, first published in 1938.<sup>242</sup> Departing from the formalists' insistence on the purely internal qualities of a given artwork, Collingwood's theory instead perceived art and artistic expression in terms more akin to that of a process or activity. Indeed, fundamental to Collingwood's conception of art is the perception that artistic expression is not substantively any different from what we might term 'ordinary expression'; a proposition that would evidently, on its face, bring the expressivism theory closer to the realm of the freedom of expression discourse outlined in Chapter One of this thesis than the formalism school can allow.

In developing upon his basic claim in which it was maintained that there was a continuity between the artistic and non-artistic – the two forms of expression being of fundamental similarity – Collingwood asserted that: "[e]very utterance and every gesture that each one of us makes is a work of art."<sup>243</sup> Underlying Collingwood's, perhaps somewhat extravagant, premise is the belief that the fundamental purpose of expression, whether artistic or non-artistic, is the seeking or establishment of 'self-knowledge.' Indeed, as Ridley surmises, '[o]ne finds out what one thinks or feels by giving expression to it.'<sup>244</sup>

With specific regards to art, under Collingwood's construction an artist is therefore, "a person who, grappling with the problem of expressing a certain emotion, says, 'I want to make this clear'."<sup>245</sup> The process through which that particularised emotion emerges is essentially one of an artist's self-discovery. Thus, the process begins with the artist knowing nothing except an awareness of a 'perturbation or excitement' within him, the nature of which he is largely unaware; such that he knows *that* he feels something, yet does not know *what* he feels. From this initial inchoate uncertainty – what Collingwood terms a 'helpless and oppressed condition'<sup>246</sup> – the artist then seeks to find an answer; the initially unspecific emotion is given form and consequently clarified *through the process* of being developed in the artwork. Accordingly, what makes art distinct from the purpose of the otherwise indistinguishable 'ordinary expression' is that the medium employed – the

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<sup>242</sup> Collingwood, R. G. *The Principles of Art*, Oxford University Press (1938)

<sup>243</sup> Collingwood (n 242) at 109

<sup>244</sup> See Ridley (n 241) at 222

<sup>245</sup> Collingwood (n 242) at 114

<sup>246</sup> Collingwood (n 242) at 109

artwork – constitutes the tangible form that *enables* the communication of the artist’s attempt to clarify the sought after, particularized, expression of emotion.<sup>247</sup> As Ridley posits: “the fully formed emotion and the expression it receives are indistinguishable from one another – indeed, they are one and the same.”<sup>248</sup>

Thus, there is a particular uniqueness about expression through art, for the particular emotion expressed in a given artwork cannot be detached from, or considered in isolation to, the artwork in which it is imbued. Accordingly, to paraphrase Ridley, there is no sense, under Collingwood’s theory of art, in suggesting that the emotion in question might have been put another way or that the emotion could have been instilled through some other means, say as a result of taking a specially formulated drug.<sup>249</sup> In this sense, therefore, the expressivist theory of art advanced by Collingwood can be seen to more readily conform with our intuitions concerning the right to freedom of expression. Rather than its value lying simply in the formal qualities of an artwork, as Clive Bell’s formalism would contend, a framework is instead established within which the underlying value of artistic expression is considered in much the same way as expression ordinarily understood – particularly the recognition, formulation and, ultimately, expression of an emotion that may, more generally be described as the development of ‘self-knowledge’ – whilst simultaneously recognizing that the form adopted in artistic expression is, in and of itself, uniquely valuable.

Collingwood’s expressivist theory of art goes some way, at least, towards satisfying the intuitions elicited in Chapter One of this thesis. For instance, in addition to there being *something* being expressed, for Collingwood, there is in existence an intimate, if not quite symbiotic, relationship between the artist and the viewers of the artist’s work. Echoing Coleridge’s observation that, “we know a poet by the fact the he makes *us* poets,” Collingwood asserted that: “when someone reads and understands a poem, he is not merely understanding the poet’s expression of his, the poet’s, emotions, he is expressing emotions of his own in the poets words, which have thus become his own words.”<sup>250</sup> As such, the process undertaken by the artist in his pursuit of the clarification of an initially inchoate emotion goes on to spark a similar process in the viewer. In this regard, then, one may reasonably consider Collingwood’s theory of art to align with and promote the

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<sup>247</sup> Stecker (n 231) at 139

<sup>248</sup> Ridley (n 241) at 223

<sup>249</sup> Ridley (n 241) at. 223

<sup>250</sup> Collingwood (n 242) at 118



Meiklejohnian supposition, outlined in Chapter One, that the arts help to establish a citizenry with the necessary all-round intelligence and empathy to participate meaningfully in the activity of self-governance.

Moreover, it is conceivable that, under a wide reading of Collingwood's expressivist theory of art, one may too bring artistic expression within the confines of Article 10 of the European Convention on Human Rights. Whilst freedom of expression under the rubric of Article 10 makes no reference to the 'expression of emotion', instead framing the right in terms of including 'information and ideas', Suzanne Langer's 'enhanced expression' theory stipulates that, since there is no sharp line distinguishing between 'emotions' and 'ideas' one ought to consider 'the expression of emotion' in its broadest sense.<sup>251</sup> Indeed, that a limited view of 'emotions' ought to be avoided at all costs is of further import to Langer on the basis that the significance of art lies in its ability to convey to its audience new experiences in such ways that are wholly distinct from other media. For instance, when Douglas Morgan pondered, "[w]ho among us would exchange the Sistine Ceiling for one more monograph, however learned, on Pauline theology?"<sup>252</sup> he was surely thinking along similar lines; noting something potentially unique about the value of art; there being something to be gleaned from, in this case, visual art that one could not ascertain from a textbook. To proffer too limited an understanding of 'emotion' would, therefore, be to neuter the significance of why we value art so greatly.

## **2.4 AESTHETIC COGNITIVISM THEORY**

### **2.4.1 Aesthetic cognitivism: Introduction**

To a certain extent, the essential premise upon which the aesthetic cognitivist school of thought is based – essentially, that art is valuable as a source of knowledge – is not vastly different to that of the notion, outlined in the previous section, that the value of art lies in its ability to express something. Indeed, whilst conceding that R.G. Collingwood's philosophy is most commonly referred to in terms of espousing an expressivist theory of art, Robert Stecker has suggested that, "[Collingwood's] understanding of expression makes it look like cognition."<sup>253</sup> Thus, for Stecker, it does not require much of a step from

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<sup>251</sup> See Freeland, C. *Art Theory: A Very Short Introduction*, Oxford University Press (2003) at 108

<sup>252</sup> Douglas Morgan, cited in Graham, G. *Philosophy of Arts: An Introduction to Aesthetics*, Routledge, 2<sup>nd</sup> ed. at 44

<sup>253</sup> Stecker (n 222) at 315

proposing that the artistic process, through which both the artist and the viewer become *aware* of the emotion that is being conveyed, to suggest that such an expression or conveyance leads to us *knowing* that emotion.<sup>254</sup> Moreover, that Collingwood himself referred to the process as promoting ‘self-knowledge’ would further indicate a degree of sympathy towards the notion of art’s value lying, to some extent, in its cognitive capacity. However, as we shall discover below, whilst there may be a degree of overlap between Collingwood’s theory of expressivism and that of cognitivism, the latter school is more far-reaching in its scope; taking ‘knowledge’ to mean more than just ‘emotions’.

As a normative philosophy on the subject of the theory of art, the cognitivist school of thought began to find widespread favour from the 1970s onwards, with Nelson Goodman’s *Languages of Art* proffering a particularly strong defence of the position.<sup>255</sup> However, debates concerning the question of whether we can learn from art go back considerably further. Thus, going back to the readings of ancient philosophy, in *The Republic* Plato dismissed the possibility of poetry affording its reader knowledge proper on the basis that it provided merely a deceptive appearance of knowledge or an imitation of reality; after all, only philosophers were considered as having the necessary attributes to discern true knowledge. On the contrary, Aristotle maintained that poetry had the capacity to reveal to its audience universal truths. However, establishing that art can act as a source of knowledge is but the first challenge needing to be addressed by the cognitivist school in contemporary thought. Secondly, and perhaps more crucially, it needs to be established that this capacity to provide knowledge is itself an aesthetic merit. After all, it is perfectly reasonable, under some accounts of the formalist school of thought, to accept that one *may* learn something from an artwork without also accepting that that knowledge has any relevance to the aesthetic qualities of that particular artwork.<sup>256</sup>

Accordingly, in maintaining that, firstly, artistic expression *is* capable of advancing knowledge and, secondly, that such knowledge may be encapsulated within the aesthetic qualities of a given work of art, the cognitivist school of thought, it is suggested, offers an account of artistic expression that most succinctly and naturally ‘fits’ within the freedom of expression paradigm. By talking in terms of knowledge acquiescence, the cognitivist school of thought provides a framework within which artistic expression may be seen to

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<sup>254</sup> Stecker (n 222) at 315-316

<sup>255</sup> Goodman, N. *Languages of Art*, Hackett Publishing Company (1976)

<sup>256</sup> See, for instance, Beardsley, M. *Aesthetics: Problems in the Philosophy of Criticism*, Hackett Publishing Company (1981) at 426-429

fall within both the Millian and (wide-) Meiklejohnian positions regarding freedom of expression that, as shall be seen in Chapter Four of this thesis, underpin the general rationales employed by the European Court of Human Rights. Moreover, that the knowledge imbued in artistic expression is *also* considered as being wrapped up in the aesthetic qualities of art, suggests that artistic expression, whilst similar to other forms of expression, is nevertheless unique in the *way* in which the expression is made. This suggestion that artistic expression operates within the freedom of expression paradigm, whilst in a simultaneously *sui generis* manner to other, more conventional modes of expression, will thereby act as a pivotal foundation for this thesis' assessment of the European Court of Human Rights' treatment of artistic expression.

#### **2.4.2 Aesthetic cognitivism's foundational premise: Art as knowledge**

Turning, firstly, to the epistemic question of whether art *can* act as source of knowledge it is clear from the range of arguments pertaining to the cognitivist school that the knowledge attributable to art has been defined in a multitude of ways. For some, artistic expression can provide us with a quasi-philosophical knowledge. In particular, it has been argued that literature provides us with a more comprehensive understanding of moral issues than it is possible to attain from academic treatises on moral philosophy alone. Thus, whilst moral philosophy may grant us an 'outline' we need literature in order to provide substance to the moral requirements of a given situation.<sup>257</sup> Related to this position, then, is the view that art can give us knowledge of possibilities or, in other words, an appreciation of how different scenarios might be interpreted or how a particular situation might feel to someone else. For instance, it has been suggested that *The Golden Notebook*, a novel ostensibly regarding Communism in Britain during the mid-20<sup>th</sup> century, shows us how a certain, "moral perplexity might have been felt by one perfectly possible person in a perfectly definite period."<sup>258</sup>

Taking the notion of the 'knowledge of possibilities' further still, others have maintained that art is, in fact, capable of providing actual knowledge; an insight into actual, human nature. In highlighting the potential for art to shed light on what might be construed as 'actual knowledge', Berys Gaut cites Freud's remark that many of ideas that went on to

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<sup>257</sup> See, for instance, Nussbaum, M. *Love's Knowledge: Essays on Philosophy and Literature*, Oxford University Press (1992) at 125–167

<sup>258</sup> Putnam, H. *Meaning and the Moral Sciences*, Routledge (2010) at 91

form the basis of his psychology may be traced back to the works Sophocles and Shakespeare.<sup>259</sup> There is, thus, an implication that the same, ultimate ‘knowledge’, may be reached through different means, for instance both artistic and scientific.

For some proponents of the cognitivist school, it is art’s power to impart practical knowledge, rather than the conceptual and propositional types of knowledge identified in the previous paragraphs, that lies at the heart of art’s value. Within this strand of cognitivism there are, in turn, several sub-strands. Thus, for Robinson, art can be said to educate us emotionally, in effect teaching us how to feel;<sup>260</sup> whilst Putnam has suggested that art can improve our practical reasoning.<sup>261</sup> Taking a slightly different line Currie submits that art promotes us to engage with our imagination, an activity that, in turn, helps us to plan our lives and to understand, engage with, and empathise for, others in our society.<sup>262</sup> Moreover, Goodman contends that that value in looking at a visual work of art lies in its ability to make us look at reality in a fresh way, and therefore appreciate aspects of the world that we had not previously considered.<sup>263</sup>

Others still have held, as R.W. Beardsmore submits, that art has the ability to help us make sense of previous events in such a way that other forms of expression could not.<sup>264</sup> Thus, in developing the notion of ‘knowledge of the significance of events’, Beardsmore takes John Stuart Mill’s confession that it was through the reading of Wordsworth’s poetry that gave his life meaning following a nervous breakdown in his early adulthood as an example demonstrative of art’s capacity to help give meaning to something that was previously meaningless.<sup>265</sup> Related, to a certain degree, to the ‘significance of events’ type of knowledge is the notion, submitted by some cognitivists, that art conveys experiential or phenomenal knowledge such as, for instance, the knowledge of what it is like to be in love or to experience the death of a loved one. As Gaut points out, such knowledge helps to

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<sup>259</sup> Gaut, B. *Art as Knowledge*, in Levinson, J. (ed) *The Oxford Handbook of Aesthetics*, Oxford University Press (2005) at 437

<sup>260</sup> Robinson, J. *L’Education sentimentale*, in S. Davies (ed.), *Art and its Messages* (1997) Pennsylvania State University Press

<sup>261</sup> See generally, Putnam (n 258)

<sup>262</sup> Currie, G. *Realism of Character and the Value of Fiction*, in J. Levinson (ed.), *Aesthetics and Ethics*, Cambridge University Press (1998)

<sup>263</sup> See generally, Goodman (n 255)

<sup>264</sup> Beardsmore, R. W. *Learning from a Novel*, in Vesey, G. (ed.), *Philosophy and the Arts: Royal Institute of Philosophy Lectures*, vol. VI. Macmillan (1973)

<sup>265</sup> Beardsmore (n 264)

broaden one's horizons, providing an experience without having to experience it first-hand.<sup>266</sup>

Accordingly, it is possible to divine three interlocking bases that can be seen to underpin the diverging opinions of the cognitivist school with regards to the precise nature of the type of knowledge conveyed by art. Whilst acknowledgment of the conveyance of knowledge is necessarily common to all cognitivists, there is dispute as to whether that knowledge is of a conceptual, propositional or practical nature, though it is clear from the above outline that individual commentators' opinions need not necessarily be neatly pigeon-holed. Thus, whilst different commentators will attribute different emphases upon the knowledge that may be gained from art, at the very least it may be said that art teaches us *something*, be it about ourselves, our fellow man, our society, or our world and that, to some extent, the implication is that art is in some way unique in the way in which it teaches us that *something*.

#### **2.4.3 Criticisms of the aesthetic cognitivist position**

However, despite the intuitive attractiveness with which it is founded – premised, namely, on the supposition that art has the capacity to impart knowledge – the cognitivists' position has been criticised for a number of reasons. The success with which the cognitivists can be seen to rebuke the criticisms will, as we shall discover in Chapters Three and Four of this thesis – have a profound impact on the assessment of artistic expression under Article 10 of the European Convention on Human Rights.

Firstly, it has been suggested that, whilst people may say that they have learned something from art, when it comes to articulating precisely *what* they have learned, it becomes rather more vexing. Detractors of the cognitivist's position would go further still, maintaining that even if someone could say what they had learned from an artwork it would likely be an articulation so banal as to be virtually worthless. Thus, Stolnitz asks what knowledge or truth *Pride and Prejudice* may be said to impart other than the banal observation that, “[s]tubborn pride and ignorant prejudice keep attractive people apart.”<sup>267</sup> The import of such an expression in the grand scheme of freedom of expression would, after all, appear somewhat trivial.

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<sup>266</sup> Gaut (n 259) at 438

<sup>267</sup> Stolnitz, J. *On the Cognitive Triviality of Art*, 32 *British Journal of Aesthetics* 191 at 193

Yet Gaut dismisses the first of the anti-cognitivists' charges, noting that not all such propositions that may be derived from art *are* in fact banal; the example proffered by Freud with regard to tracing his own theories back to the works of Sophocles and Shakespeare being an apt example.<sup>268</sup> As Gaut goes on to maintain: "whatever the truth of Freud's theories, *banal* they are not."<sup>269</sup> Moving on from the more empirical observation that the propositions stemming from artworks need not necessarily be banal, Gaut goes on to argue that such a claim is fundamentally misguided for, as we have seen above, propositional knowledge is not the only type of knowledge considered to emanate from art. Whilst propositional knowledge is an important consideration for some, most cognitivists would place a greater emphasis on practical or conceptual knowledge associated with the appreciation regarding the significance of past events or experiential knowledge.<sup>270</sup> Instead, with regards to literature, for instance, we see the actual world in light of our understanding of the fictional world, in ways that are not necessarily capable of forming a propositional statement. To paraphrase Currie: it is possible to know how to ride a bike yet be unable to say, precisely how one does, in fact, ride a bicycle.<sup>271</sup>

The second common criticism of the cognitivists' position, as highlighted by Gaut, is that even if we were to assume that we *can* learn from art, it does not follow that it can be claimed that art contributes to that knowledge in a unique way.<sup>272</sup> Thus Stolnitz, in comparing art with science, has maintained that, whereas science has a distinctive method by which it can achieve scientific truths, there are no truths that *only* art can reach.<sup>273</sup> Some cognitivists, as we have seen above with regards to Nussbaum's assertion that art offers a more comprehensive understanding of morality than is possible through moral philosophy alone, have attempted to maintain that the anti-cognitivists' objection is simply unfounded. Yet, in order to avoid a conceptual stalemate, a more nuanced approach may be appropriate.

For instance, Gaut contends that 'uniqueness' need not be an essential component of the cognitivists' theory of art. There are, as Gaut goes on to argue, no 'truths' that can be attained from reading a newspaper that cannot be attained from watching news programmes on the television, yet one may *prefer* to gain one's knowledge of current

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<sup>268</sup> Gaut (n 259) at 439

<sup>269</sup> Gaut (n 259) at 439

<sup>270</sup> Gaut (n 259) at 439

<sup>271</sup> Currie (n 262) at 164

<sup>272</sup> Gaut (n 259) at 439

<sup>273</sup> Stolnitz (n 267) at 191-192

affairs through the printed press because of its convenience, thoroughness and portability.<sup>274</sup> Accordingly, whilst the truths or knowledge that one may gain from art may not, in themselves, be unique to art, the *manner* in which they are reached might be; to return to Freud's assertion, one may prefer to gain an insight in to the human condition from reading the plays of Shakespeare than by reading a Freudian text on psychology.

A further criticism of the cognitivists' theory of art stems, again, from the supposed need of propositional statements in order to achieve knowledge. As Diffey has asserted, "[h]ow can a work of art be faithful to the facts it would teach if art is not by its nature fact-stating,"<sup>275</sup> the point being that one cannot gain knowledge of the real world if art acts under the suspension of actual worldly concerns. The presumption held by the anti-cognitivists, then, is that the most an artwork can 'say' is, 'let us imagine *x*', rather than, 'it is asserted that *y*' such that, in a sense, the only knowledge that art can possibly convey is an imaginative knowledge perhaps akin to the deceptive knowledge ascribed to poetry in Plato's *The Republic*.

Again, however, Gaut submits that the anti-cognitivists' objection is empirically not necessarily the case; portraiture seeks an accurate representation of the subject, landscapes will often depict the actual scenery, many films document some actual situation and much poetry is derived from the poet's own, historic experience.<sup>276</sup> As such, one may read-in to such artworks an implicit 'it is asserted that *y*'. What's more, one may even find, in wholly fictional works, both implicit and explicit assertions. Thus, it is explicitly stated in *Pride and Prejudice* that, "[i]t is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a good wife," whilst, Gaunt suggests, one may read, in *Emma*, the more implicit assertion that, "attractive, assertive, and spoiled young ladies are often not the best judges of their own motivations and behaviour."<sup>277</sup>

Yet, even if we accept that one *may* find assertions in works of art, the anti-cognitivists strongest objection roots itself in the Platonic assertion that knowledge requires a justified, true belief. Thus, even if we accept that truths may emanate from art, it remains the case that art simply cannot guarantee the requisite *justification* or *reliability* needed to form

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<sup>274</sup> Gaut (n 259) at 440

<sup>275</sup> Diffey, T. *What Can We Learn from Art?* in Davies, S. (ed.) *Art and its Messages: Meaning, Morality and Society*, Pennsylvania State University Press (1997) at 30

<sup>276</sup> Gaut (n 259) at 441

<sup>277</sup> Gaut (n 259) at 441

actual knowledge. Thus, according to Stoltz, whilst Charles Dickens' *Bleak House* may well accurately describe the tardiness of estate litigation in Victorian Britain, the novel alone is incapable of assuring a reliable justification for the premise to be regarded as knowledge. To acquire knowledge of this state of affairs, under the justified true belief mantra, one would need to further consult textbooks on legal history.<sup>278</sup> Accordingly, supposing that the legal process *was* in fact ineptly slow in 19<sup>th</sup> century Britain, my knowledge of that truth, if based solely on a reading of *Bleak House*, would have been coincidental; I would simply have stumbled across the truth rather than gained it through the process of ensuring a justified, true belief.

However, given the fact that propositional knowledge is not the *sole* concern of the cognitivist, if we accept that the knowledge attained through art need not be unique and that, nonetheless, one may still find implicit and express assertions in artworks, the cognitivist position remains strong; its comprehensive recognition of the multitude of ways in which we may be seen to learn from art weather many of storms put forward by the anti-cognitivist commentators. Thus, as Gaut contends, even if one were to concede to Stoltz's point regarding art's inability to provide justified true beliefs, it does not undermine *all* of the types of knowledge that art can be said to convey.<sup>279</sup> For instance, the justified true belief objection would certainly fail to undermine the arguments that art conveys knowledge of possibilities (since they are not claiming to be 'actual' knowledge), as well as conceptual knowledge (on the basis that new concepts, by their nature, cannot be empirically tested).

We can see, therefore, that much of the value pertaining to artistic expression according to the cognitivist school of thought lies in its rather peculiar relationship with knowledge. Establishing that art *can*, in some way, contribute to knowledge – either by way of a conceptual, practical or propositional manner – is only the first challenge facing the cognitivists' theory of art; the second fundamental challenge being to establish a relationship between the cognitive and aesthetic elements of an artwork. Whilst the knowledge or truths reached through art may not be unique, for the same truths may be arrived at through different means – say, with reference to a psychology textbook or a newspaper – the *manner* in which they are reached is, to a certain extent, distinct.

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<sup>278</sup> Stoltz (n 267) at 196

<sup>279</sup> Gaut (n 259) at 441-442



Accordingly, whilst it has been conceded by many cognitivists that art does not (or need not) operate within the traditional scientific framework of propositional knowledge, art is still perceived to play a uniquely invaluable role. As Dewey submits, art enables people to perceive, manipulate, and engage with reality in a distinctive way.<sup>280</sup> Furthermore, considered as one might consider a language, Goodman goes on to maintain that, by subtly enlarging our understanding of the world, through its unique use of symbols and forms, art has the capacity to, “transform our perceptions [and] energise us.”<sup>281</sup> It is of fundamental importance, therefore, to address precisely how the aesthetic qualities of art may be said to promote the cognitive value of art in order to, in turn, appreciate the distinctive way in which art and artistic expression operates within the freedom of expression paradigm.

#### **2.4.4 The relationship between the cognitive and the aesthetic: a synthesised theory of art**

It would be a mistake, according to Gaut, to simply infer from the cognitive value of art that art is therefore valuable. Instead, “[w]hat a cognitivist has to do is show that the cognitive values of art are aesthetically relevant.”<sup>282</sup> In seeking to establish this link between the cognitive and the aesthetic, Beardsmore has asserted that: “when we learn from a work of literature, then what we learn, the content of the work, is essentially bound up with the way in which the writer expresses himself, bound up, that is, with the author's style.”<sup>283</sup> Thus, the aesthetic qualities of a work – the development of characters in a novel or a film, the choice of lines and colours in a painting, the lighting and angle of a photograph – are, in fact, intrinsically interwoven in to the way in which the cognitive elements of that work of art are conveyed. As Gaut stipulates: “it is the *way* that a work conveys its cognitive merits – the *mode* by which it conveys its insights – that makes them of aesthetic relevance.”<sup>284</sup> Accordingly, under Beardsley's assessment, there is a certain synthesis of all the theories of art considered in this chapter.

Thus, even formalist principles – if not the premise that one ought to consider art's value *only* in terms of the formal qualities of an artwork – may be seen to coexist alongside the cognitivists' claim that we can gain understanding through art and the expressivists'

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<sup>280</sup> See generally, Dewey, J. *Art as Experience*, Minton, Balch & Company (1934)

<sup>281</sup> See Goodman (n 255)

<sup>282</sup> Gaut (n 259) at 444

<sup>283</sup> Beardsmore (n 264) at 45

<sup>284</sup> Gaut (n 259) at 445

process of advancing self-knowledge and emotional awareness. Art may therefore, for the purposes of freedom of expression doctrine, be seen to be simultaneously similar to ordinary expression in that it deals in the acquisition of knowledge, whilst proffering a distinct methodology in pursuing its ambitions. There is, as such, a nuanced relationship both between art and knowledge and the aesthetic means through which that knowledge is attained.

For instance, if we consider Macbeth's soliloquy, in which the protagonist proclaims that:

Life's but a walking shadow, a poor player  
That struts and frets his hour upon the stage  
And then is heard no more.

our primary concern is not with the *truth* or otherwise of Shakespeare's portrayal of despair<sup>285</sup> – we are not concerned with whether or not Shakespeare was correct in identifying that life *is* a walking shadow, but rather whether the despair experienced by Macbeth has been aptly portrayed in his expression, through the use of words, syntax and metaphor. It is through the successful deployment of such artistic qualities, then, that we can be said to learn, and with which we may be said to engage with reality. Indeed, in arguing that the purpose of art is to reveal truth through the material world, Hegel emphasised that, "Art thus involve[s] a reconciliation of matter and content." In other words, more often than not, in the case of artistic expression, the medium *is* the message.

## **2.5 CONCLUSION: SYNTHESISING THE THEORIES OF ART AND FREEDOM OF EXPRESSION**

From the above overview of the theories of art, it becomes possible to surmise two broad, though related, points. Firstly, art and artistic expression are potentially unique in as much as they are capable of simultaneously conveying both cognitive and non-cognitive elements, such as to further our understanding of the world and human experience, in ways that other modes of expression are perhaps deficient and which may be seen to align quite easily with Meiklejohnian approach to freedom of expression underpinning the importance of the arts in creating a populace with the required intelligence and sensitivity to effectively

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<sup>285</sup> Indeed, if 'truth' *were* our primary concern when considering the works of Shakespeare their value would be inevitably diminished, for it has been established, for instance, that the bard in fact erred on the dates given for Julius Caesar's battles.

engage in public discourse as well as the Millian conception of the importance of expression as a means towards truth, however defined. Accordingly, with the emphasis placed by Article 10 on the exchange of *ideas*, the extent to which artistic expression is protected in practice will therefore depend largely on the Court's recognition of the way in which art contributes to such an exchange as distinct from political expression.

That art is capable of conveying 'ideas' is not necessarily an essential condition of art. As we have seen, the Kantian position's requirement of adopting a position of disinterestedness when creating and viewing art precludes the possibility of art communicating ideas, whilst the formalist position of the 20<sup>th</sup> century would maintain that the value of an artwork lies exclusively within the internal, formal qualities, such as lines and colours, rather than in any experience that may be depicted or knowledge that might be gleaned from the work.

However, other theories of art are more accommodating and susceptible to being brought within the freedom of expression paradigm: Collingwood's theory concerning the expression of emotion and the aesthetic cognitivism theories would both, for instance, suggest that something *can* be expressed through art. Furthermore, that the expression of emotion forms part of a process in which the artist (as well as the viewer) come to realise something, to in some way develop, brings artistic expression close to value of freedom of expression identified under the self-fulfilment rationale. Moreover, if we take a pluralist understanding of the theory of art, one in which the cognitive aspects of art – whether of a conceptual, practical or propositional level – are considered to be intertwined with the aesthetic, or artistic, qualities of an artwork one can begin to appreciate the need to consider art as a *sui generis* category within the generalised doctrinal considerations pertaining to freedom of expression. Thus, whilst artistic expression can be considered as 'expression' for the purposes of freedom of expression care also needs to be taken to appreciate the particular way in which art makes that expression.

Indeed, that art ought to be considered as a *sui generis* category of expression forms the backbone of Kearns' scholarship concerning the under-protection of artistic expression in the European Court of Human Rights' Article 10 jurisprudence. For Kearns, then, "[a]rt has a distinct ontology, and is culturally recognised as a discrete body of value, being

emergent from the creativity of individuals.”<sup>286</sup> Therefore, according to Kearns’ thesis, art’s autonomy, “should invite the special individual treatment of art by law-makers so that any perceived ‘transgressions’ of acceptable moral boundaries by it in a social context are understood to be taking place within the artistic order, ie within art’s normal internal canons of operation.”<sup>287</sup> Accordingly, as Kearns goes on to assert, “[a]rt...simply offers itself and invites the appropriate meditative (aesthetic) attitude. [Art] is thus generous not constricting, and it is not the exertion of a will that its contemplation results in real-life disaccord. *Art is an option for its reader or viewer, not an imposition.*”<sup>288</sup> Thus, “any offence for which art is the alleged stimulus is the result of an incorrect psychic approach on the part of the reader or viewer.”<sup>289</sup> As such, under Kearns’ thesis, artistic expression’s under-protection in the case law pertaining to Article 10 stems from the failure of the Court to appreciate art’s distinct ontology or the unique way in which it operates as a form of expression.

In noting the distinctive way in which art operates, *qua* the nuanced relationship that art enjoys with reality, one is therefore mindful of the formal qualities of the work – that art is founded in the shapes, lines and colours employed by the artist as well as in the use of such techniques as metaphor and exaggeration. Moreover, the pluralist approach taken by those cognitivists that consider the aesthetic qualities of art are, in a sense, part and parcel with the cognitive elements imbued in a work of art would also be able to incorporate an appreciation of the Kantian notion of the sublime; a feature of art that, for Nahmod, may be seen as the underpinning of artistic expression relatively low level of judicial protection.

Accordingly, whilst the underlying nature of the Kantian notion of beauty emphasises unity – both internally, in terms of the internal harmony of beautiful art, and externally, in terms of the subjective universality with which all cultured persons will concur as to what is beautiful – the converse is true of Kant’s notion of the sublime. Whereas, the beauty in a work of art, for Kant lies in its mediation between the divide between knowledge on the one hand and desire or notions of morality and politics, on the other, the sublime emanates precisely because of that gulf.<sup>290</sup> Moreover, the sublime, for Burke, may be described as that which inspires terror, the fear of pain or death, in a person who is in fact not in danger

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<sup>286</sup> Kearns (n 16) at 162

<sup>287</sup> Kearns (n 16) at 162

<sup>288</sup> Kearns (n 16) at 29 (emphasis added)

<sup>289</sup> Kearns (n 16) at 28-29

<sup>290</sup> Nahmod (n 216) at 234

and, moreover, is knowingly not in danger.<sup>291</sup> Going further, the sublime, as construed by Nahmod, has the effect of inspiring feelings of dissolution and disintegration, in stark contrast to the unity proffered by beauty's harmony.<sup>292</sup> What's more, after applying this distinction – between the beautiful and the sublime – to First Amendment jurisprudence, Nahmod notes that it is (or at least was) the Supreme Court's preference for the unifying and cohesive aspects of art over the discord prompted by the sublime that led to the undervaluing of artistic expression, rendering its protection dependant on its proximity to political expression. Indeed, it might be considered that it is the very nature of the sublime and its challenging of the status quo that has led to art and artistic expression being considered so subversive and consequently marginalised.

History teaches us of the (arguably) inherently subversive nature of art. Indeed, in noting the largely overlooked role played by controversial art in challenging the use of slavery in England, Kearns posits that, “morally controversial art plays a crucial role in challenging the moral status quo that often then opens a pathway to a new moral order in society.”<sup>293</sup> In this regard, it has been said that every book or work of art is a response and answer to an earlier work, such that art is involved in a, “continual self-revising process of consensual reality.”<sup>294</sup> Therefore, in as much as art and artistic expression is therefore considered to the product of, and contribution to, society's development, a strong correlation can be found with the self-fulfilment and self-realisation rationales for freedom of expression. As Doctorow points out, if the political works of Karl Marx are considered to be a product of his social context, then the same must be true of the works of William Shakespeare.<sup>295</sup>

Yet identifying with any precision the position enjoyed by the artist and his artistic endeavour within society – especially in terms of identifying artistic expression's value for the purposes of the right to freedom of expression - is not without difficulty, especially when the value underlying freedom of expression is identified in the contribution that it makes to public discourse. For, as Doctorow muses, “[w]hen a...novelist sits down to write a book she does not contemplate the role of art in democracy.”<sup>296</sup> However, whilst artists are not necessarily political they nevertheless cannot help but draw on their experiences

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<sup>291</sup> Burke, E. *A Philosophical Enquiry Into the Origin of Our Ideas of the Sublime an Beautiful* (1757) cited in Nahmod (n 216) at 233

<sup>292</sup> Nahmod (n 216) at 233-235

<sup>293</sup> Kearns (n 16) at 10

<sup>294</sup> Doctorow, E. L., *Address to the students of the Tisch School for the Arts*, in Campbell, M. S. and Martin, R. (eds.) *Artistic Citizenship: A public voice for the arts*, Routledge (2006) at 56

<sup>295</sup> Doctorow (n 294) at 56

<sup>296</sup> Doctorow (n 294) at 51-52

and conceptions of the real world such, so Turner posits, that they become a ‘consciousness of society.’<sup>297</sup> It is in this sense, therefore, that the playwright Arthur Miller considered writers and artists to be ‘public figures’;<sup>298</sup> their expression being the expression of an individual’s attempt to understanding or give meaning to the society in which they found themselves.

In his preface to *The Picture of Dorian Gray* Oscar Wilde made the assertion that, “[t]he only excuse for making a useless thing is that one admires it intensely. *All art is quite useless.*”<sup>299</sup> Kearns adamantly disagrees, stating that, far from being useless, “it is just that art’s usefulness is complicated and refined, rather than simple and banal.”<sup>300</sup> From the above overview of the theories of art, one would tend to agree with this observation. Defining art’s distinctive role in society – its societal utility – is challenging, especially if social utility is considered in conjunction with a narrow reading of expression’s contribution to public discourse. For whilst artists need not be overtly political, their work – through the imaginative “mak[ing] and remak[ing] of the world” in which they find themselves<sup>301</sup> – bears political connotations (with a small ‘p’). Thus, artistic expression is valuable, not only for the artist in the pursuit of their own self-fulfilment, but for that of the audience as well. Indeed, to reiterate Kearns’ underlying position, “[a]rt...cannot impose itself. It is passive, ready to be activated only by a reader’s will to read it.”<sup>302</sup> Accordingly, even art that shocks us has value for, when one considers art in the context of it being art – such as to recognise the distinctive qualities pertaining to it as a form of expression – “[t]hrough the shock, we begin to understand some truth about our world, including about art and about ourselves.”<sup>303</sup> Moreover, whilst conceding that, “[n]ot all art is great; very little of it is,” Doctorow asserts that even ‘lesser art’ ought to be protected in order to allow for an environment from which great art *can* emerge.<sup>304</sup> Indeed, one might well suppose that, “there would have been no Shakespeare without the community of Elizabethan dramatists and poets, many of whom were second rate.”<sup>305</sup>

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<sup>297</sup> Turner, E. *The Artist in the Amphitheatre*, 43 *Law and Contemporary Problems* 308 (1979) at 313-315

<sup>298</sup> Cited in Turner (n 297) at 315

<sup>299</sup> Holland, M. (ed) *Complete Works of Oscar Wilde*, Collins (2003) at 17 (emphasis added)

<sup>300</sup> Kearns (n 16) at 10

<sup>301</sup> Doctorow (n 294) at 53

<sup>302</sup> Kearns (n 16) at 75

<sup>303</sup> Kearns (n 16) at 10

<sup>304</sup> Doctorow (n 294) at 57

<sup>305</sup> Doctorow (n 294) at 57

Yet it is this sense of perpetual agitation, of pushing boundaries – a notion inherently bound up with the project of postmodernism, succinctly summed up by the artist Karel Appel when she said that ‘art must shock’<sup>306</sup> – that might be considered as the basis for artistic expression’s unfavourable treatment in judicial settings. For Douzinas, “[t]he law is able to appreciate new art only after it becomes a matter of convention, use and habit; in other words, when art becomes like law.”<sup>307</sup> Similarly, Kearns explains that, “[l]aw is an agent of the past and evolves more slowly in its processes than most other social units, such as...art and fashion.”<sup>308</sup> As such, owing to its inherent conservatism, law is said to, “sometimes ha[ve] difficulty in dealing with phenomena that are not neatly a priori [...]. Of particular concern to a legal system is the threat to order and the continuity of that order.”<sup>309</sup>

The potential for there to be tension between artistic expression and the state qua law is therefore abundantly clear. For, as Doctorow posits, “[h]owever beneficent and enlightened the society society may be, there is an eternal argument between the accepted, agreed upon communal truths and the artist’s act of witness, which must always have a whiff about it of the disruptive. [...] As such, it is inconceivable that in any society in which the answers have already been asserted that free expression and the multiplicity of witnesses [emanating from art’s expression] can be anything but a danger to the state, or an affront to God or the Fuhrer.”<sup>310</sup>

It is with this thought in mind that artistic expression’s relevance to the freedom of expression discourse becomes most acute. If it is art’s inherently subversive, progressive nature that lies at the root of authority’s suspicions, then art’s value ought to be seen to align with any and all of the principles underlining why we value the right to freedom of expression in general. For art and artistic expression can be seen to reveal, whether separately or conjunctively, truth – either the artist’s truth or a truth within ourselves, as observer’s and co-creators of art – the promotion of a process of self-realisation and fulfilment, that may be seen as a pre-requisite for our functioning in the democratic process. Yet, at the same time, artistic expression’s value is seen to lie in the distinctive nature with which it operates, leading one commentator to assert that, “artistic expression is more and

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<sup>306</sup> Quoted in Kearns (n 16) at 67

<sup>307</sup> Douzinas, C. *The Aesthetics of Law*, in McLean, D. (ed.) *The Trials of Art* (2007), Ridinghouse, p. 66

<sup>308</sup> Kearns (n 16) at 67-68

<sup>309</sup> Kearns (n 16) at 68

<sup>310</sup> Doctorow (n 294) at 53 and 56

is different than freedom of expression.”<sup>311</sup> Accordingly, the extent to which artistic expression is in fact protected within Article 10 will be dependent upon the extent to which artistic expression is valued as a distinct form of expression, an analysis of which will follow in Chapter Four.

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<sup>311</sup> Tanasescu, S. *Artistic Freedom and its Limitations*, 2 Rom. J. Comp. L. 9 (2011) at 25-26



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## **CHAPTER THREE**

### **THE CATEGORISATION OF EXPRESSION: FROM THEORY TO PRACTICE**

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#### **3.1 INTRODUCTION**

The discussion to follow in Chapter Three intends to elicit, after an initial theoretical overview, the key strands to have emanated from the European Court of Human Rights' general approach to categorising expression in to its various component parts – namely political/public interest, artistic, and commercial expression – and the attributing of varying levels of protection thereafter. Perhaps as a result of Article 10's silence on the issue, framing the right to freedom of expression in general terms simply as including the conveyance of 'information' and 'ideas'<sup>312</sup> – the Court's practice regarding the categorisation of expression has in the past often been less than overt. However, with the increase in case law has come an increasing number of difficult cases, the determination of which have become ever more explicitly based on the Court's categorisation of expression and subsequent attribution of varying degrees of judicial scrutiny and oversight, vis-à-vis the application of the doctrine of margin of appreciation, to the multitude of forms that expression can be manifested.<sup>313</sup> The purpose of the present chapter is therefore firstly to proffer a theoretical framework from which to secondly assess the Court's practice with regards to the categorisation of expression.

As we have seen in Chapters One and Two of this thesis, the relationship between artistic expression and freedom of expression doctrine is somewhat vexing; it not being universally accepted that art does, or even should, have any meaning other than being art for the sake of art. Nevertheless, it has been demonstrated that artistic expression *does*, at least under such theories of art pertaining to the expressivist and aesthetic cognitivist schools, have the capacity to communicate *something*, whether that something be emotions *simpliciter* or knowledge of a type that may be loosely referred to in terms of 'information and ideas'.

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<sup>312</sup> For a more detailed discussion on the history of Article 10's drafting process, including the explicit inclusion of artistic expression as a form of expression in its earlier drafts, see Chapter Four.

<sup>313</sup> See, for instance, *Case of Mouvement Raelien Suisse v. Switzerland* (2012), para. 61: "The breadth of such a margin of appreciation varies depending on a number of factors, among which *the type of speech at issue is of particular importance*." (emphasis added). See also Leigh, p. 57:

Accordingly, therefore, there is a theoretical basis from which one may begin to acknowledge the alignment between art, artistic expression and freedom of expression doctrine. As such, this theoretical framework – noting the *sui generis* nature in which art and artistic expression may be seen to operate within and contribute to the generalised philosophy of freedom of expression – will inform the analysis of the European Court of Human Rights’ treatment of specifically artistic expression (in Chapter Four) and the Court’s categorisation of expression (below).

In light of Article 10’s non-differentiated exposition of the meaning of ‘expression’ – in which no reference is made to the various forms that expression might take, such that ‘expression’ is, instead, defined simply with reference to the receiving and imparting of ‘information’ and ‘ideas’ – and given the theoretical convergence, established in Chapters One and Two *infra*, between artistic expression and key strands relating to freedom of expression doctrine, it is therefore curious that there remains a commonly held assumption that artistic expression enjoys a relatively low level of protection under Article 10.<sup>314</sup> The task of rationalising the European Court of Human Rights’ jurisprudence on the matter of categorising expression is therefore of fundamental import both in order to explain and justify the existing curio of differentiated protection within a non-differentiated human right as well as to form a theoretical basis for an analysis of the European Court of Human Rights’ treatment of specifically artistic expression and this thesis’ subsequent suggestions for the improved protection of artistic expression in the future.

Thus, in proffering the basis from which to address this issue, this chapter begins by placing the discussion within the context of the distinction made by Schauer between *coverage* (that expression which is said to be included within freedom of expression guarantees) and *protection* (the extent to which a covered expression is, in fact, actually protected). Accordingly, it will be established that the practice of attributing different levels of protection to different types of expression is not, from a theoretical perspective at least, a controversial practice.

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<sup>314</sup> This assumption is commonly held in academic commentaries of the European Convention on Human Rights (see, for instance, Harris et al (n 1) at 455-465) as well as being borne out of a *prima facie* observation of the findings of a non-violation of Article 10 in the European Court of Human Rights’ early, leading cases concerning artistic expression (see, for instance, *Müller*, *Otto-Preminger* and *Wingrove*).

Following on from these theoretical considerations Chapter Three will then turn to the practical application of Schauer’s coverage-protection distinction with particular reference to the European Court of Human Rights’ interpretation of Article 10. In so doing, the question of precisely what ‘expression’ means for the purposes of Article 10 will be addressed; firstly, with regards the issue of ‘coverage’, in which a brief examination of instances in which Article 10’s threshold for ‘expression’ is *not* considered to have been triggered will be outlined before proceeding, secondly, to the matter of ‘protection’ and the more substantial body of case law concerning the attribution of differing levels of protection *within* those types of expression recognised as being at least covered by Article 10. There, the manner and methodology in which the Court has conducted the categorisation of expression will be more thoroughly discussed. By establishing the rationale employed by the European Court of Human Rights with regards to the practice of categorising expression in general the stage will be set for Chapter Four’s analysis of the Court’s case law concerning specifically *artistic* expression.

## **3.2 THEORETICAL CONSIDERATIONS CONCERNING THE CATEGORISATION OF EXPRESSION**

### **3.2.1 Introductory remarks**

In seeking to address the European Court of Human Rights’ treatment of artistic expression under Article 10 of the European Convention on Human Rights it is necessarily instructive to proffer a sound theoretical basis, *in abstracto*, for the categorisation of expression and attribution of differing levels of protection thereafter from which to contextualise an analysis of the case law. The notion of distinguishing between different categories of expression is, however, by no means novel. By way of example, and citing the now infamous example of the Skokie Affair<sup>315</sup> in the United States of America – in which an ordinance seeking to prohibit a neo-Nazi group from demonstrating in a predominantly Jewish neighbourhood was deemed unconstitutional under the protections afforded by the First Amendment – Thomas Scanlon has pointed out that categories, “appear to play an important role in informal thought about the subject,” before going on to postulate that the residents would likely not have been expected to endure the same treatment had the expression not been ‘political’.<sup>316</sup> Implicit in Scanlon’s assumption, then, is the underlying

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<sup>315</sup> *National Socialist Party of America v. Village of Skokie* 432 U.S. 43 (1977)

<sup>316</sup> Scanlon (n 97) at 519-520

sense that some expression is deemed to be of greater value, and therefore subject to greater safeguards, than others; a position that is recognised in academic opinion on the subject.<sup>317</sup>

In seeking to proffer a theoretical basis facilitative of the ‘informal thought about the subject’ noted by Scanlon, the discussion to follow in the opening half of this Chapter will demonstrate that there is ample reason to suppose that expression can, despite the non-differentiated explication of the right to freedom of expression within Article 10, be categorised in to its various component parts and that, furthermore, each category of expression can be subject to a varying degree of protection. Moreover, it will be suggested that assessing the European Court of Human Rights’ jurisprudence in light of this theoretical framework will provide an insight in to the Court’s attitude towards artistic expression, as a form of expression, more particularly.

### **3.2.2 Categorical versus balancing approaches to the protection of freedom of expression: An overview**

Informing much of First Amendment analysis regarding the right to freedom of expression’s interpretation, scope and corresponding protection has been the distinction made between ‘categorical’ and ‘balancing’ approaches<sup>318</sup>; a brief overview of which will help to contextualise the following discussion’s emphasis on the importance placed by Schauer on the need to recognise the conceptual distinction between the right’s coverage and its protection.

According to Kathleen Sullivan, the distinction to be made between categorical and balancing approaches can be summed up with the recognition that, “categorisation corresponds to rules, balancing to standards.”<sup>319</sup> Thus, a strictly categorical approach will resolve the issue in a linear manner such that, as Sullivan goes on to explain, “once the relevant right and mode of infringement have been described, the outcome follows without

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<sup>317</sup> See, for instance, Hare, I. *Is the privileged position of political expression justified?* in Beatson, J. and Cripps, Y. (eds) *Freedom of Expression and Freedom of Information: essays in honour of Sir David Williams*, OUP (2000); Rowbottom, J. *To Rant, Vent, and Converse: protecting low level digital speech*, Cambridge Law Journal 355 (2012) (especially at 369); Wragg, P. *Free speech is not valued if only valued speech is free: Connolly, consistency and some Article 10 concerns*, 15 E.P.L. 111 (2009)

<sup>318</sup> See, for instance, Blocher, J. *Categoricalism and balancing in First and Second Amendment analysis* 84 N.Y.U. L. Rev. 375 (2009)

<sup>319</sup> Sullivan, K. *Post-liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992) at 293-294

any explicit judicial balancing.”<sup>320</sup> In other words, once the right has been identified or triggered within the relevant legal framework, its protection will follow in a categorical and unqualified manner without recourse to any judicial balancing of other competing interests. On the other hand, the rule-based, linear structure of categoricalism may be contrasted with the methodology inherent in balancing approaches according to which the outcome cannot be determined from the beginning. Instead, as Sullivan stipulates, “the judges’ job is to place competing rights on a scale and weigh them against each other.”<sup>321</sup>

Elaborating on the distinction made by Sullivan – and of importance to note in the proceeding explication of Schauer’s coverage-protection distinction – Blocher points out that whilst both approaches rely on the consideration of underlying constitutional values, they do so in different ways.<sup>322</sup> Thus, with regards to categorical approaches, reference to value is only required at the category’s inception so as to justify a particular category’s existence within the scope of the right itself. Thus, once the value of a category of expression is recognised as falling within the framework of freedom of expression provided by a given constitutional guarantee, the linear judicial application of the right’s protection will continue to proceed without further recourse to the expression’s value, as noted by Sullivan. On the other hand, for Blocher, the balancing approach requires a more habitual consideration of underlying constitutional values: such values acting as a kind of ‘common metric’ from which one is able consider the value of a given category of expression in light of competing interests.

Whilst it may be conceptually useful to consider the categorical and balancing approaches as polar extremes, in reality the two approaches do at times converge. Indeed, the opening two Chapters of this thesis, by seeking to locate the right to artistic freedom of expression within the broader nexus of freedom of expression more generally, may be regarded as promoting the categorical approach as understood by Blocher. Taking, as its initial premise, the notion that artistic expression is, in some way, treated detrimentally under the auspices of Article 10, the starting point of this thesis was to explicate the value of art and artistic expression in such a way as to confirm its existence as a form of expression for the purposes of Article 10. To borrow from Blocher’s terminology, Chapters One and Two therefore sought to refer to value at the inception of artistic expression’s inclusion within Article 10.

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<sup>320</sup> Sullivan (n 319) at 293-294

<sup>321</sup> Sullivan (n 319) at 293-294

<sup>322</sup> Blocher (n 318) at 381-383

This initial categorical position, in so far as it recognises the alignment of artistic expression within the underlying values of the freedom of expression discourse, will subsequently inform the discussions surrounding the European Court of Human Rights' jurisprudence in which the extent to which the underlying value, recognising artistic expression's inclusion within Article 10 in principle, can be seen to extend in to the Court's actual practice of balancing various interests.

### **3.2.3 Blocher's Three Approaches to Categorical Analysis**

Accordingly, in discussing the theoretical basis from which the judicial categorisation of expression, and the ensuing variability with which categories of expression are seen to be protected, may be based, it is instructive first to clarify what exactly is meant by 'categorisation'. According to Joseph Blocher's analysis, one may consider the categorisation of expression in three ways: coverage, classification (or sub-categorisation) and protection.<sup>323</sup> Thus, issues of categorisation may be considered: firstly, in establishing those categories that are regarded as triggering Article 10 in the first place; secondly, as to whether a given (covered) expression may be *sub*-categorised so as to warrant (usually intermediate) protection; and, finally, with regards to the sub-categorising of covered expression, in determining the level of protection to be afforded a given act of expression.<sup>324</sup>

Therefore, given the non-differentiated articulation of the right to freedom of expression within Article 10 – such that the case law is predominantly concerned with the *sub*-categorisation of covered expression and the varying levels of protection afforded thereafter – of paramount significance for present purposes are Blocher's second and third conceptions of categorisation. For the sake of comprehensiveness, however, and in the interest of emphasising the distinction needing to be made between the right to freedom of expression's coverage and its protection, as required under Schauer's analysis, the ensuing discussion shall begin with an outline of Blocher's first area of categorisation; namely the category of 'covered' expression.

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<sup>323</sup> Blocher (n 318) at 387

<sup>324</sup> Blocher (n 318) at 387

### 3.2.4 Freedom of expression as a category of conduct

In line with Blocher's analysis, expression may, in the first instance, be categorised in terms of that which is covered by constitutional guarantees and that which is not. Indeed, with particular reference to the United States Supreme Court's jurisprudence, Schauer has pointed out that, "[n]ot every case is a first amendment case."<sup>325</sup> Put another way, Schauer implores us to appreciate that not every case concerning speech or expression is rightly contained within the free speech paradigm. A somewhat obvious observation, perhaps – after all, amongst the various schools of thought on the topic of freedom of expression there is a rare consensus in free speech discourse that the right to freedom of expression, properly understood, is not, and should not be, unqualified. It will be remembered, from the overview provided in Chapter One, for instance, that a distinction is made between expression that constitutes 'discussion' (which is absolutely protected under the principles of rule-utilitarianism) and that which constitutes 'positive instigation' (according to which the protection of such expression varies according to the principles of act-utilitarianism) under the Millian defence of freedom of expression.<sup>326</sup> Similarly, even the wide-reaching, autonomy-based theory of freedom of expression advanced by Scanlon would seek to exclude from protection expression of a type surmised in his 'nerve gas' example,<sup>327</sup> whilst expression's protection under Meiklejohnian, democracy-based constructs is dependent upon its furthering of, and contribution to, the democratic process.<sup>328</sup>

Moreover, it is important to remember that the right to freedom of expression under Article 10 is itself a qualified right; the limitation clauses set out in Article 10(2) outline instances in which the State may lawfully restrict one's right to freedom of expression.<sup>329</sup> Yet, by reminding us that expression protected under the First Amendment (and, by extrapolation, Article 10 of the European Convention on Human Rights) is itself a category – or, in other

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<sup>325</sup> Schauer, F. *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265 (1981) at 267

<sup>326</sup> For an exposition of Mill's defence of freedom of expression see Chapter One, section 1.2.1

<sup>327</sup> In which it was supposed that providing a recipe for the creation of a nerve gas out of household goods ought to be unprotected. For more on Scanlon's autonomy-based defence of freedom of expression see Chapter One, section 1.3

<sup>328</sup> For an exposition of Meiklejohn's democracy-based defence of freedom of expression see Chapter One, section 1.4.1

<sup>329</sup> The (potentially) legal limitations to the right of freedom of expression, identified in Article 10(2) of the European Convention on Human Rights are: national security, territorial integrity, public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

words, a category of conduct deemed worthy of protection – Schauer directs our line of inquiry beyond the question of ‘What is speech?’ towards the more functionally important question of, ‘What is freedom of speech?’

Whilst this distinction may appear to be a matter merely of tautology, it remains an important one to recognise. Turning to the dictionary, were we to limit ourselves solely to the foundational question of ‘What is speech?’ we would likely end up with an intolerably broad scope of speech or expression warranting protection. For instance, ‘speech’ may be defined as, “the expression of or the ability to express thoughts and feelings by articulate sounds,” whilst ‘expression’ is described, not dissimilarly, as, “the action of making known one’s thoughts or feelings.”<sup>330</sup> Clearly, the freedom to make known one’s thoughts – if left unchecked – could give rise, to borrow Schauer’s terminology, to ‘many distinctly discordant acts of expression’. After all, libel, slander, obscenity and possibly even child pornography could, somewhat counter-intuitively, be construed as ‘speech’ or ‘expression’ under such broad definitions so as to render any regulation in these areas of potential concern from a ‘free speech’ perspective. In order to avoid such a counter-intuitive position it is therefore crucial that a distinction be made between ‘speech/expression’ *simpliciter* and the more normatively important question of what we mean by ‘freedom of expression’.

Recognising that not every case concerning speech is a free speech case and refocusing the issue towards the determination of what we mean by ‘freedom of speech’ can, to a certain extent, be seen to alleviate such problems that might arise from employing a dictionary definition of speech or expression. Indeed, as the overview of the various strands of thought with regards to the theory of freedom of expression sought to demonstrate in Chapter One an important notion underlying the right to freedom of expression is that of the perceived *value* of the right in a societal context. Thus, for Mill, the value of free expression lies in its supposed propensity to achieve societal truth by the challenging of dogma, Scanlon’s thesis locates the value of freedom of expression broadly in terms of respecting individual autonomy whilst Meiklejohn’s defence of freedom of expression, as well as Weinstein’s later formulation, places the value of free expression in terms of its relationship to, and advancement of, democracy whereas Redish identifies the value of freedom of expression in its capacity to induce self-realisation, the achievement of which acts as a precondition for the enjoyment of the other principal rationales. Accordingly, whilst the value of freedom of expression is considered by different commentators in

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<sup>330</sup> Oxford Online Dictionary



different ways, and with differing emphases, freedom of expression doctrine is, at its foundation, seen to encompass something more than simply ‘speech’ or ‘expression’ *per se*. As such, if we were to rephrase Benjamin Constant’s assertion, noted in Chapter Two’s discussion of the theory of art, we may state that what we are concerned with, when investigating freedom of expression, is not speech for the sake of speech.

Underlying this conceptual clarification is Schauer’s plea for us to appreciate that in considering ‘freedom of expression’, one is in fact necessarily employing a ‘constitutional language’ with distinct meanings from those of everyday usage.<sup>331</sup> In essence – though running the risk of circularity – under the ‘constitutional language’ advanced by Schauer, ‘freedom of speech’ may be defined as that area of conduct protected (to whatever degree) under a given constituting document. Of course, such a definition *is* circular and does little, in and of itself, to identify what expressive acts are, in fact, to be protected under guarantees of freedom of expression. Nonetheless, it remains instructive to remember that at its most fundamental level, ‘freedom of expression’ is itself a category of conduct within whose parameters a given act of expression enjoys a greater degree of protection than would otherwise be afforded.<sup>332</sup>

The vexing question remains, however, of engaging in the practical, judicial delineation of the scope of acts to be included (or at least *potentially* included) within the coverage of the term ‘freedom of expression’, and the subsequent degree of protection to be afforded therein. To determine this question, one must engage with, and distil from, the case law any given court’s understanding and application of the ‘constitutional language’ pertaining to freedom of expression. Moreover, precisely *how* artistic expression is understood within this ‘constitutional language’ – the protection with which artistic expression is considered to enjoy with the right to freedom of expression more generally – will be instructive in this thesis’ objective of determining and analysing the treatment of specifically *artistic* expression under Article 10 of the European Convention on Human Rights. By turning next to the important distinction to be made between the *coverage* of a right and the subsequent *protection* of a right, a sound theoretical basis will be proffered from which a variable protection of freedom of expression can be employed.

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<sup>331</sup> Schauer (n 325) at 269-270

<sup>332</sup> Accordingly, as witnessed in Mill’s defence of freedom of expression, it is recognised that ‘expression’ is a form of (quasi-)conduct rooted, through the external manifestation of one’s thoughts, in societal relationships in such a way as to be distinct from the wholly internal freedom of opinion. See Chapter One, especially section 1.2.2

In turn, and in remembering Blocher’s assertion that the categorical approach to the question of freedom of expression’s protection hinges on the value recognised as being imbued in a given category of expression’s inception,<sup>333</sup> in recognising the theoretical basis for such variable protection one may distil the ‘constitutional language’ employed by the European Court of Human Rights in its identification of the underlying value(s) of the right to freedom of expression in general and of freedom of artistic expression in particular which will inform the discussion, in Chapter Four, of the treatment of artistic expression under the Court’s Article 10 jurisprudence. Thus, whilst Article 10 is generally recognised as encompassing a broad range of expression within its coverage (including artistic expression) it will be suggested that the relatively low level of protection afforded to artistic expression may be explained in terms of the Court’s failure, in its jurisprudence, to recognise and give effect to the very value that justifies artistic expression’s inclusion within Article 10’s coverage in the first place.

### **3.2.5 Introducing the coverage-protection distinction: the limitations of a strictly ‘categorisation as coverage’ approach to freedom of expression protection**

Early First Amendment jurisprudence is perhaps most clearly indicative of Blocher’s ‘categorisation as coverage’ approach to the protection of freedom of expression. Traditionally, First Amendment jurisprudence centred on the ‘two-level theory’ extrapolated from the *Chaplinsky* case, such that speech was simply categorised in to that which is protected and that which is unprotected.<sup>334</sup> Accordingly, speech was considered to be protected unless it fell within ‘certain well-defined and narrowly limited classes of speech’ (namely the lewd and obscene, the profane, the libellous, as well as ‘insulting’ or ‘fighting words’). Categorical and absolutist in its nature, this position’s advancement has perhaps most famously been articulated by Justice Black who wrote, extra-judicially, that:

“one of the primary purposes of the Constitution with its amendments was to withdraw from the Government *all* power to act in certain areas – *whatever the scope of those areas may be*.”<sup>335</sup>

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<sup>333</sup> Blocher (n 318) at 381-383

<sup>334</sup> *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942)

<sup>335</sup> Black (n 160) at 874-875 (emphasis added)

As is clear from the qualification offered in italics, Justice Black was not advocating an absolute freedom of expression *per se* (in other words, he was not maintaining a stance of speech for the sake of speech) but, rather, an absolute freedom *within* established boundaries. Accordingly, and by way of comparison, parallels may therefore be drawn between the theoretical approach taken by Black and that of the Millian notion of ‘discussion’, a form of expression warranting absolute protection in order to secure the long term objective of truth under the modes of rule-utilitarianism, as distinct from that expression considered to be a ‘positive instigation’ which is, under the principles of act-utilitarianism, subject to potentially greater restriction.<sup>336</sup> Moreover, whilst not advocating an absolute freedom of expression *per se*, the formulaic approach adopted by Justice Black – according to which the recognition of a given expression as being covered by First Amendment leads, automatically, to its protection – is symptomatic of Sullivan’s articulation of the categorical approach as being rule-based and somewhat linear in its methodology noted above.<sup>337</sup>

Despite the appealing facial simplicity of Black’s position, Schauer has warned of the dangers inherent in the absolutist’s mantra. Underlying Schauer’s criticism is the observation that the absolutist position has, “collapsed the important distinction between coverage and protection,”<sup>338</sup> resulting in the supposedly erroneous concluding notion that all that is covered is protected. Whilst this position may be explained historically with reference to the peculiarities of American political philosophy and a desire to narrow judicial discretion,<sup>339</sup> such an approach remains untenable for Schauer for two interrelated reasons based, predominantly, on notions of first principles. Firstly, defining an area of absolute protection is, for Schauer, impossible on account of the fact that it is unlikely, if not plainly undesirable, to suppose that any one theory can explain the concept of free speech such that, secondly, any attempt to define an absolute theory of speech that incorporates all of the required exceptions and qualifications will be so fundamentally hampered by our own lack of omniscience as to lose sight of the fundamental values associated with protecting speech in the first place.<sup>340</sup> That so much ink has indeed been spilled over philosophical inquiries in to the nature of freedom of expression, as alluded to in the opening chapter’s overview of the right to freedom of expression, would indicate a

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<sup>336</sup> For an exposition of the Millian position, see Chapter One, section 1.2.1

<sup>337</sup> See section 2.3.2, *infra*

<sup>338</sup> Schauer, F. *op cit*, p. 275-276

<sup>339</sup> For instance, see Schauer (n 325) at 275

<sup>340</sup> Schauer (n 325) at 277-278

confirmation of Schauer's scepticism regarding the possibility of achieving a singular, universally accepted theory of freedom of expression. Instead, in the interest of flexibility and pragmatism, Schauer proposes that by making the distinction between coverage and protection, one can gain a more comprehensive understanding of freedom of expression issues that is able, in turn, to react appropriately to unknown future situations and contexts.

Lying at the crux of the issue, therefore, is Schauer's apprehensive hypothesis that rights are simply more likely to be absolute (i.e. *protected*) if the range or scope of the right's *coverage* is narrow. Such a hypothesis is imbued with the resultant danger that, "the criteria of absolutism exerts an inward pull on the boundaries of coverage," such that, "the boundaries [of *protected* freedom of expression] may eventually become far narrower than the underlying theory."<sup>341</sup> The danger, as Schauer sees it, is aggravated by the doctrinal crudity of the categorical-absolutist position, according to which, simply put, expression of type *x* is considered to be protected absolutely whilst expression of type *y* remains out with the sphere of protection altogether. Therein lies the conflation between coverage and protection: expression of type *x* being both covered *and* protected whereas expression of type *y* is not covered and, therefore, not protected. As such, as a result of the categorical-absolutist's tendency to conflate the issues of coverage and protection, a formulaic and binary approach to the question of expression's protection is employed that runs the risk of obscuring, if not entirely diminishing, the possibility of engaging in a principled assessment of the various forms that expression may take: the concomitant fear being that non-conventional or doctrinally difficult expression is simply considered to fall out with the freedom of expression's protective sphere altogether.

### **3.2.6 The coverage-protection distinction: An explication of Schauer's position**

Of importance to the extrapolation of Blocher's 'sub-categorisation' and 'protection' approaches to interpreting the right of freedom of expression, after having noted the risks of employing a categorical absolutist position, Schauer maintains that a more nuanced approach is required that is both more normatively sound and reflective of judicial approaches to freedom of expression cases. By way of analogy, in describing the coverage-protection distinction Schauer invites us to imagine wearing a suit of armour so that one might say, "I am *covered* by the armour. This will *protect* me against rocks, but *not* against

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<sup>341</sup> Schauer (n 325) at 276

artillery fire.”<sup>342</sup> There is, as such, an almost inevitable discrepancy between coverage and protection. In the same way that being covered by the armour will provide varying levels of protection depending on the level of the attack, so too must the coverage of freedom of expression – itself a category of protected conduct – enjoy varying levels of protection. Thus, rights in general, “may cover certain conduct, by requiring greater persuasive force in order to restrict that conduct,” leading, of course, to the inverse proposition; namely that, “some reasons may be sufficiently powerful to penetrate the coverage of a right.”<sup>343</sup>

In that regard, according to Schauer:

The distinction between coverage and protection suggests both the structure and the order with which to clarify the concept of free speech. It is necessary first to determine what activities are covered, and then determine how and to what extent those activities are protected.<sup>344</sup>

Moreover, in turning to the challenge of marking out the parameters of the coverage of freedom of expression, it is instructive to consider Schauer’s remark that, “[d]efinition is parasitic on justification.”<sup>345</sup> Thus, in deciding both the coverage and subsequent protection to be afforded to a given expression, one must look to the first principles justifying the inclusion of a particular kind or type of expression with reference to the underlying theory or theories of freedom of expression. Put another way, ‘covered speech’ may be identified as that speech which promotes the value(s) underpinning the constituting document in which the right is found – which, for present purposes, may be considered to be Article 10. As Schauer so succinctly puts it:

“Ideally we are looking for a principled definition of the Free Speech Principle, a definition that incorporates only those forms of communication that in some way relate to those reasons for recognising such a principle in the first place.”<sup>346</sup>

Furthermore, in remembering Blocher’s assertion that under the balancing approaches of ‘sub-categorisation’ and ‘protection’ one needs to continually refer to underlying values in assessing the degree of protection to be afforded, the level of protection afforded to a given expression under Schauer’s theoretical framework is itself dependent upon the proximity with which it is perceived to align with the values of the right’s constituting document.

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<sup>342</sup> Schauer (n 140) at 89 (emphasis in the original)

<sup>343</sup> Schauer (n 140) at 89

<sup>344</sup> Schauer (n 140) at 91

<sup>345</sup> Schauer (n 140) at 102

<sup>346</sup> Schauer (n 140) at 102

That such a theoretical framework is advantageous is confirmed by Sunstein, who argues that establishing a sliding-scale of protection for expression, based on the expression's value in light of its centrality, or proximity, to the values of, in Sunstein's case, the First Amendment.<sup>347</sup> By emphasising the importance of value in determining the level of protection to be afforded to covered speech, Sunstein establishes a constitutional anchor from which judges can develop a coherent and overtly reasoned jurisprudence.<sup>348</sup>

Again, it was with this need to contextualise freedom of expression in terms of underlying value in mind that Chapters One and Two of this thesis sought to establish a theoretical foundation from which to assess the case law of the European Court of Human Rights. By first demonstrating the unique manner by which art and artistic expression can be said to communicate and thus convey 'information' and 'ideas' (an important, though not necessarily determinative, consideration in the Court's application of Article 10), so as to establish artistic expression within the freedom of expression paradigm and proffer a framework from which to assess the European Court of Human Rights' treatment of artistic expression as a sub-category of covered expression.

Before turning our attention to the issue of specifically artistic expression under Article 10, the remainder of this chapter seeks to apply Schauer's theoretical justification for the categorisation to practice employed by the European Court of Human Rights in which the Court's definition of 'expression' will be explored with reference to the stated scope of the right to freedom of expression (ie. its *coverage*) and the levels of *protection* afforded to expression held to be covered. From this position, and by building on the underlying framework proffered in Chapters One and Two, a more thorough and contextualised investigation of the treatment of artistic expression will therefore ensue in Chapter Four.

### **3.3 WHAT IS 'EXPRESSION' FOR THE PURPOSES OF ARTICLE 10?**

#### **3.3.1 The threshold question: Introduction**

The justification for the coverage-protection distinction advanced by Schauer has so far, necessarily, been primarily framed in the context of the United States and the First Amendment. Accordingly, it has been established that not every case concerning

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<sup>347</sup> Sunstein, C. *Low value speech revisited*, 83 Nw. U. L. Rev. 555 (1988-1989) at 556-557

<sup>348</sup> Sunstein (n 347) 557-558

expression or speech is correctly considered a First Amendment case. Can the same be said of the European Convention on Human Rights: is every case concerning expression an Article 10 case? In general, the majority of case law of the European Court of Human Rights does not, *per se*, indicate an engagement in a binary, *Chaplinsky*-type approach to the protection of expression that informed First Amendment jurisprudence in the mid-twentieth century and according to which excluded certain categories of speech – namely, the lewd, obscene and fighting words – from the First Amendment’s coverage altogether. Instead, the European Court of Human Rights has, as we shall see below, recognised a broad range of expression as at least *potentially* falling within the scope of Article 10’s protective sphere, such that the theoretical basis for the variability of protection, recognised in the distinction made by Schauer between coverage and protection, in line with the notion of ‘sub-categorisation’ advanced by Blocher, becomes particularly acute.

Indeed, with the development of a four-level theory superseding that of its binary predecessor, First Amendment jurisprudence has itself evolved since the relatively early case of *Chaplinsky*.<sup>349</sup> Accordingly, a tiered approach to the protection of speech has emerged under the First Amendment such that within the category of protected speech one may elicit three degrees of protection (summarised by Eberle as ‘high’, ‘intermediate’ and ‘low’) in addition to that speech which remains unprotected.<sup>350</sup> The First Amendment free speech jurisprudence has, as we shall see below with particular reference to the European Convention on Human Rights found itself aligning more considerably with Article 10 jurisprudence, precisely because of the disentanglement of the coverage-protection dichotomy.

That the European Court of Human Rights has approached its Article 10 jurisprudence relatively liberally with a catholic appreciation of what constitutes ‘expression’ for the purposes of the Article 10, has been confirmed by Voorhoof who has described the evolution of the Court’s Article 10 jurisprudence as evincing an ever-increasing scope of coverage, as well as protection, of expression.<sup>351</sup> Whilst Voorhoof’s observation is, as we shall see below, largely correct there remain a small number of cases in which the Court has rejected outright applications as being inadmissible primarily on the grounds that the

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<sup>349</sup> For an overview of this evolution see Eberle, E. *The Architecture of First Amendment Free Speech*, Mich. St. L. Rev. 1191 (2011)

<sup>350</sup> Eberle (n 349) at 1193-1194

<sup>351</sup> Voorhoof, D. *Freedom of expression under the European Human Rights System: From Sunday Times (No. 1) v. UK (1979) to Hachette Filipacchi Associés ("Ici Paris") v. France (2009)*, 2 Inter-Am. & Eur. Hum. Rts. J. 3 (2009)

expression in question fell out with Article 10's sphere of coverage altogether. A brief survey of such cases concerning the issue of Article 10's 'coverage' is therefore instructive in helping to determine, largely by way of negative deduction, the essential question of what constitutes 'expression' for the purposes of Article 10 before moving on to the Court's practice of categorising and attributing differing levels of protection to expression within Article 10 itself. In so doing – and in line with the theses of Blocher, Sunstein and Schauer – it is hoped that we might begin to see the value(s) imbued in the right to freedom of expression under Article 10 and so inform the basis of Chapter Four's analysis of the European Court of Human Rights' case law regarding artistic expression.

### ***3.3.2 The threshold question: an overview of the European Court of Human Rights and the European Commission on Human Rights' admissibility case law***

The Article 10 jurisprudence from both the European Court of Human Rights and the now defunct Commission has approached the question of what kind of expression engages – or, perhaps more accurately, expression that does *not* engage – Article 10 from two main angles: the internal (with reference to Article 10's purported intent) and the external (with reference to Article 17's assurances that a Convention right may not be employed to inhibit other Convention rights). In each instance, therefore, we may see Schauer's premise that definition is parasitic on justification, such that the expression in question need demonstrate the furthering of Convention values, both specifically with regards to Article 10 and, more generally, of the Convention as a whole in order to fall within Article 10's coverage in the first place.

By providing a summary of a selection of cases in which Article 10 was considered to be inapplicable, so as to necessarily deny a judgment as to the merits of the case, it is hoped that the value, deemed worthy of protection inherent in the right to freedom of expression, will begin to come to the fore. With, as Schauer asserts, definition being parasitic on justification and in line with Sunstein's thesis regarding a sliding scale of protection dependent upon the centrality of the expression in question to the values of the right's constituting document, by outlining the reasoning underpinning the exclusion of certain expression from Article 10's scope a definition of what exactly is meant by 'expression', for the purposes of Article 10 will begin to emerge. Furthermore, this vantage point, in recognising the core values to which Article 10 is seen to aspire, will proceed to inform the



analysis of the European Court of Human Rights' case law concerning artistic expression in which, following Schauer and Sunstein's theses, the level of protection of artistic expression under Article 10 will be considered in light of the extent to which the Court can be seen to recognise artistic expression's capacity to further the values perceived to be imbued in Article 10.

### *X v. U.K (1979)*

Firstly, then, a given act of expression may be denied Article 10 protection *internally*, in the sense that the 'expression' is not of a type recognised as befitting the intended gist of Article 10's protection. Such was the Commission's stance in two early cases, both of which, confusingly, are entitled *X v. UK*. The first case, decided in 1979, whilst perhaps more accurately pertaining to the question of freedom of information than to freedom of expression *per se*, remains instructive in so far as it advances the notion that Article 10 simply does not recognise certain ideas or information. That certain ideas and information are indeed considered to fall out with Article 10 altogether, it is suggested, may go some way in explaining the unease felt, through a degree of conflation of the coverage-protection distinction, by the European Court of Human Rights when determining the protection of controversial expression *within* Article 10; a state of affairs that, as will become evident in Chapter Four, is potentially detrimental to artistic expression.

Turning our attention back to the question of coverage and the perceived scope of Article 10's guarantees, the first *X v. UK* case concerned the refusal to inform the applicant ('Moors Murderer' Ian Brady) of the names of those persons sitting on a committee charged with determining the applicant's 'prisoner status' – a process which, in turn, would affect the applicant's privileges in prison. In declaring the application to be manifestly unfounded and, therefore, inadmissible, in *X v. UK* the Commission maintained that the type of information being sought simply did not fall within, "the *concept* of information within the meaning of Article 10..."<sup>352</sup> With reference to the *Sunday Times* case, heard by European Court of Human Rights earlier in 1979, the Commission thus framed the concept of the information underpinning Article 10 in terms of the public having the right to receive information on matters of public interest.<sup>353</sup>

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<sup>352</sup> *X v. UK* (1979) European Commission On Human Rights, p. 203 (emphasis added)

<sup>353</sup> See *Sunday Times v. UK* (1979) 2 EHRR 245, para 65

By making a distinction between the type of information being conveyed in the present case and that of the *Sunday Times* (a case regarding a newspaper's reporting on the effects of the use of thalidomide during pregnancy) the Commission held that the information being requested in *X v. UK* was not of a type or nature recognised as falling within the ambit of Article 10, such that the applicant's Convention rights, naturally, could not be said to have been engaged in the first place. Thus, in the parlance of the European Court of Human Rights' jurisprudence, there could not be said to have been an interference with the applicant's Article 10 rights, the result of which necessarily precluded any further assessment of either the necessity or proportionality of the State's refusal to provide the information. Whilst one may dispute the Commission's determination as to the nature of expression for the purposes of Article 10, Schauer's thesis regarding the notion that definition be parasitic on justification still holds true: the information sought by the applicant was considered to not align with the justification for freedom of expression imbued in Article 10. Put another way, some expression is simply not expression for the purposes of Article 10 according to the 'constitutional language' employed by the Commission.

#### ***X v. UK (1980)***

The second *X v. UK* case, decided the following year in 1980, concerned the applicant's conviction for the buggery of two (consenting) eighteen-year old males. In addition to his complaint under Articles 8 (family and private life) and 14 (discrimination), the applicant alleged that his right to freedom of expression had been violated on the grounds that his incarceration prevented him from both expressing his views as well as expressing his feelings of love to other men. Again, as with the previous *X v. UK* case, the Commission determined that there had been no interference with the applicant's Article 10 rights, this time on the supposed grounds that, "[Article 10] does not encompass any notion of the physical expression of feelings in the sense submitted by the applicant." Instead, the Commission asserted that, "the concept of 'expression' in Article 10 concerns mainly the expression of opinion and receiving and imparting information and ideas," thus excluding the applicant's 'physical expression' of feelings entirely from the protective scope of Article 10.

Thus, as with the first of the *X v. UK* cases, the second instance again demonstrates an attempt at locating the type of expression considered to be at the heart of Article 10.

Moreover, by setting the ‘physical expression of feelings’ apart from the ‘information’ and ‘ideas’ of Article 10’s intrinsic purpose and value, one may begin to see, in the distillation of the notion of expression underpinning the ‘constitutional language’ of Article 10, a definition within which artistic expression may be seen to rest somewhat precariously. One must, of course, be careful not to draw too much from the conclusion reached in the Commission’s brief extrapolation of expression in the 1980 *X v. UK* case: as we shall see, artistic expression *has*, since the late 1980s, recognised artistic expression’s inclusion within the nexus of Article 10. However, that reference was indeed made to the ‘physical expression of feelings’ in determining that the expression was not of a sort conducive to the guarantees of Article 10 is interesting, especially in light of Chapter Two’s overview of the principal theories of art whereby, it will be remembered, the expressivist school of thought – underpinned by Collingwood’s thesis – purported that that the fundamental role of art is to elicit and communicate emotions. Whilst a more comprehensive assessment of artistic expression under Article 10 will emerge in Chapter Four, it suffices to say, for present purposes, that the type of expression in question – and the proximity with which it is perceived to be with regards to ‘information’ and ‘ideas’ will necessarily have a profound effect, not simply in terms of judicial recognition that the expression is *covered* by Article 10 but that it is, moreover, *protected* by Article 10’s guarantees.

***Rujak v. Croatia (2012)***<sup>354</sup>

Similarly, in the more recent case of *Rujak v. Croatia* the European Court of Human Rights confirmed that, notwithstanding the fact that the Article 10 guarantees are said to apply to offensive and shocking acts of expression, such principles, “do not exclude a possibility that certain categories of expression may not be covered by the protection of Article 10 [...]”.<sup>355</sup> Elaborating, the Court went on to assert that the question to be asked was, “whether, in light of the *reasons* for the protection of freedom of expression, the type of communication in issue is covered by the guarantee [of Article 10].”<sup>356</sup> Thus, the applicant, a serving member of the Croatian army at the material time, could not be said to be covered by the protective sphere of Article 10 for saying, during an argument with two recruits, “I fuck your baptised mother”, it being “open to question whether there is good reason for protecting expression of insults.”<sup>357</sup>

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<sup>354</sup> *Rujak v. Croatia*, Application no. 57942/10, decided 2<sup>nd</sup> October 2012 (HUDOC)

<sup>355</sup> *Rujak* (n 354) at para. 27

<sup>356</sup> *Rujak* (n 354) at para. 27 (emphasis added)

<sup>357</sup> *Rujak* (n 354) at paras. 27-28

The echoes of Schauer’s submission that definition is parasitic on justification can clearly be heard in the European Court of Human Rights’ reasoning in *Rujak* and the exclusion of the expression in question with reference to the *reasons* for protecting the right freedom of expression in general. Yet, owing to what might be described as the internal approach taken by the Court – that is the notion that Article 10 is inherently blind to certain types of expression – that the applicant had been convicted of ‘tarnishing the reputation of the Republic of Croatia’ (which would appear, at least *prima facie*, to have resulted from the applicant’s further comments that, “This is not my State, I am not it’s national, I don’t recognise you, your rank or the Croatian Army.”), nor the six month sentence (later suspended with a two year probation period) were therefore not open for analysis under the proportionality matrix discussed below: Mr Rujak’s expression having been deemed not to have met the threshold required to fall within Article 10’s scope and trigger any potential protection.

***Norwood v. UK (2005)***<sup>358</sup>

The Commission’s peremptory exclusion of protection in cases like *X v. UK* and *Rujak* which can be considered as being grounded internally in Article 10 and its presumed intentions regarding scope *vis* an assumed ‘free speech’ justification, may be compared with the case of *Norwood* in which the Court refused, at the admissibility stage, to engage Article 10 *externally* by relying on the prohibition of the abuse of Convention rights enounced in Article 17.<sup>359</sup> Underlying Article 17 is the affirmation that “[n]othing in this Convention may be interpreted as implying....any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein [...]”, such that the ‘expression’ in question – a poster depicting a flaming Twin Towers and the symbol of the crescent and star inside a prohibition sign alongside the text, “Islam out of Britain” – amounted to a general attack on a specific religious group. As such, the attribution of a grave act of terrorism to the religion of Islam in general was considered to be diametrically opposed to the values inherent in the Convention, namely those of tolerance, social peace and non-discrimination. Accordingly, the specific poster in question was, to all intents and purposes, not considered to be ‘expression’ for the purposes of Article 10 precisely because of its ‘anti-Convention’ ethos.

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<sup>358</sup> *Norwood v. UK* (2004) (admissibility) (2005) 40 E.H.R.R. 11

<sup>359</sup> *Norwood* (n 358)

### *Garaudy v. France*

The position adopted by the Court in *Norwood* can be more comprehensively explained with reference to the earlier case of *Garaudy v. France* in which the admissibility of historical revisionist expression regarding the nature and scope of the Holocaust was addressed. The applicant – described as a philosopher, writer and former politician – published a book entitled *The Founding Myths of Israeli Politics*. Given the inclusion of such chapters as *The Myth of the Nuremberg Trials* and *The Myth of the Holocaust*, criminal proceedings were brought against the applicant on the basis of denying crimes against humanity, publishing racially defamatory statements and inciting racial or religious hatred or violence and the domestic courts subsequently agreed that the arguments maintained in *The Founding Myths of Israeli Politics* amounted to a denial of the ‘Final Solution’ and the methods employed by Nazi Party during the Second World War. Accordingly, the applicant was fined and awarded a suspended prison sentence.

At the admissibility stages before the European Court of Rights the applicant sought to argue that the French authorities had misconstrued the line of argument in his work and that the book did not deny the crimes against the Jews perpetrated by the Nazis but, instead, had been intended solely as a critique of the policies of the State of Israel such that his conviction amounted to an unjustified interference with the exercise of his right to freedom of expression. However, in holding the applicant’s claim under Article 10 to be inadmissible on the basis that it was manifestly unfounded, the Court can be seen as excluding the expression in question from Article 10’s scope with reference to the guarantees of Article 17. Thus, the Court accepted that, “[t]here is no doubt that, like any other remark directed against the Convention's underlying values ..., the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10” before going on to acknowledge that there is a “category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17”<sup>360</sup> As such, as with *Norwood*, the expression in *Garaudy* was considered to fall out with Article 10’s coverage altogether because of its irreconcilability with the values underpinning the European Convention on Human Rights when taken as a whole. Moreover, the Court, in reaching its decision that the applicant’s

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<sup>360</sup> *Garaudy v. France* (HUDOC) English Translation, p. 22, citing *Lehideux and Isorni v. France* (1998) (HUDOC) paras. 53 and 47

complaint was manifestly unfounded, went on to elaborate on the relationship between the purposes of Article 10 and the underlying purposes of the Convention, arguing that the applicant was attempting to “deflect Article 10 of the Convention from its *real purpose* by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention.” As such, the position taken in *The Founding Myths of Israeli Politics* was seen, rather than as a genuine historical quest for truth, as an attempt to ‘rehabilitate’ the National-Socialist ideology in such a way as to run contrary to the values associated with freedom of expression within the framework of the European Convention on Human Rights and therefore entirely out with the coverage of Article 10.

By surveying a sample of cases in which the applicants’ allegations of an infringement of their right to freedom of expression were denied at the admissibility proceedings (and thereby indicating the scope of Article 10’s coverage) it has been demonstrated that there are instances in which the European Court of Human Rights will, in essence, consider the expression in question not to be expression for the purposes of Article 10. Thus, where the expression in question is not considered to align with the ‘concept’ of expression within Article 10 or advance the underlying purposes of Article 10 and the European Convention on Human Rights as a whole, the Court has demonstrated a willingness to cast the expression out with the coverage of Article 10’s sphere of influence. Accordingly, in line with Schauer’s summation that definition is parasitic on justification, we may begin to see the oblique emergence of an under-riding value pertaining to Article 10’s right to freedom of expression that informs the judgments of the Court. By next turning to the categorisation of expression *within* the parameters of Article 10 (i.e. expression *covered* by Article 10’s guarantees) such values will begin to come more to the fore and act as the basis for Chapter Four’s analysis of the case law pertaining to specifically artistic expression.

### **3.3.3 Categories of expression *within* the ambit of Article 10**

Notwithstanding the above mentioned cases, the European Court of Human Rights has been credited with recognising a broad range of types of expression as at least *potentially* falling within the parameters of Article 10. Indeed, it was not the *form* of expression *per se* in, for instance, *Norwood* (poster) or *Rujak* (oral statements) that precluded their coverage within Article 10 but, rather, the failure of the expression’s content or intended meaning to align with either the values of Article 10 specifically or the Convention more generally. Moreover, in the literature, there remains the sense that the Court – whether explicitly or

implicitly – engages in the categorisation of that expression which is recognised as falling *within* the scope of Article 10 so as to affect the degree of protection afforded thereafter.

Turning to the textbooks on the European Convention on Human Rights, we find that freedom of expression is often recognised as comprising of three broad categories: namely, political/public interest, artistic and commercial expression.<sup>361</sup> Whilst it was not until the late 1980s that the potential guarantees of Article 10 were explicitly extended to artistic (*Müller* in 1988) and commercial (*Markt Intern* in 1989) expression,<sup>362</sup> the following decades have demonstrated the development of a hierarchy of expression, such that political/public interest expression is considered to enjoy greater protection than artistic expression which, in turn, enjoys greater protection than commercial expression. Of course, as Schauer is at pains to emphasise, such a differential in the levels of protection within the underlying category of covered expression is not necessarily unprincipled: the extent to which covered expression is protected can vary depending on the extent to which the expression may be seen to align with the right to freedom of expression's underlying objectives.

However, there appears to be a lack of judicial scrutiny as to how this differentiated approach may be justified and, indeed, implemented consistently. A survey of the key cases in this area seeks, therefore, to identify the extent to which Schauer's methodology – according to which definition of expression may be deduced from the right's underlying justification – may be extrapolated from the European Court of Human Rights' approach to categorising expression. Moreover, the developing trends in the Court's approach to categorising expression will, it will be suggested, have consequentially contributed to doctrinal difficulties that have emerged in recent case law and, as such, account for the relatively precarious protection afforded to artistic expression.

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<sup>361</sup> See, for example, *Harris et al* (n 1) at 455-465 (who include the additional category of 'civil interest' which I shall subsume within political expression)

<sup>362</sup> Though it should be noted that the now defunct Commission had recognised commercial expression's potential a decade earlier in *X. and Church of Scientology v. Sweden*.

### **3.4 THE VARIABLE PROTECTION OF FREEDOM OF EXPRESSION UNDER ARTICLE 10: CASE LAW ANALYSIS**

#### **3.4.1 The categorisation of expression *within* Article 10: Introductory remarks**

It will be remembered that under the analysis provided by the theses of Blocher, Schauer and Sunstein there exists a theoretically sound basis for the varying of protection of sub-categories of expression within the coverage of Article 10's sphere of influence according to which value can be seen as informing, in the first instance, a category of expression's inclusion within the freedom of expression paradigm and, secondly, the extent to which covered expression is to be protected. Whilst the previous section sought to bring attention to various examples in which the expression in question was not considered 'expression' for the purposes of Article 10 – such that it was deemed not to be *covered* by the guarantees of Article 10 – the following discussion seeks to provide an overview of the European Court of Human Rights' approach to categorising expression *within* Article 10, paying particularly close attention to the role played by value in so doing.

Accordingly, in developing upon the notion outlined in the previous section – in which it was noted that certain expression was conceptually not of the type considered to be of value for the purposes of Article 10 – the discussion to follow will explore the underlying values perceived to be imbued in Article 10 and the effect that this has had on the protection of different categories of expression. With the hierarchy of expression emanating from the European Court of Human Rights usually being referred to in terms of political expression achieving the greatest degree of protection and commercial expression achieving the lowest degree of protection (such that artistic expression falls somewhere in between) the following discussion, and its extrapolation of the Court's approach to the question of categorising expression, will therefore focus predominantly on the question of political and commercial expression, from which a basis will be established to more thoroughly assess the Court's treatment of specifically artistic expression in the following Chapter.

Crucial to the development of a hierarchy of expression within its Article 10 jurisprudence is the Court's application of the 'margin of appreciation' doctrine, according to which member States and their courts are conceded, as Barendt explains, "some discretion in determining whether it is appropriate to limit the exercise of the rights guaranteed by the



ECHR.”<sup>363</sup> As such, the level of discretion afforded to member States profoundly affects the intensity of scrutiny with which the European Court of Human Rights is able (or willing) to discern whether a given interference with a convention right was proportionate. Before proceeding to distil the core values from which Article 10 is seen to operate, it is therefore instructive first to provide an overview of the margin of appreciation doctrine and its impact on the Court’s assessment of gauging the proportionality of a State’s interference with freedom of expression in light of the limitation clauses of Article 10(2).

### **3.4.2 The margin of appreciation doctrine, proportionality and the structure of Article 10(2)**

In order for an interference with expression not to violate Article 10 it is necessary for the State to adduce that the interference was ‘prescribed by law,’<sup>364</sup> genuinely pursued a legitimate aim<sup>365</sup> and was ‘necessary in a democratic society.’<sup>366</sup> The degree of scrutiny with which the Court makes its assessment of the State’s interference is, however, inversely proportionate to the degree of discretion afforded to the State under the principle known as ‘the margin of appreciation’ doctrine. Put another way, the level of protection afforded to expression under Article 10 is largely dependent upon the scope of discretion bestowed on the State with regards to the fulfilment of its Convention obligations.

The doctrine of the margin of appreciation is therefore, as Barendt notes, one of the most distinctive features of the Court’s approach to interpreting and enforcing the rights enshrined in the Convention.<sup>367</sup> Whilst the doctrine is often referred to and relied upon in the Court’s case law, the margin of appreciation remains notoriously difficult to define with any degree of clarity. Morrisson has even gone so far as to contend that the doctrine is, “not

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<sup>363</sup> Barendt (n 27) at 44

<sup>364</sup> In defining the phrase ‘prescribed by law’, the judgment in *The Sunday Times* case (n 353) at para. 49, stipulates that the law pertaining to the expression’s interference must be ‘adequately accessible’ and ‘formulated with sufficient precision to enable the citizen to regulate his conduct.’

<sup>365</sup> *The Sunday Times* case (n 353) at para. 57. Under Article 10(2) the legitimate aims are: in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>366</sup> For the interference to be considered necessary in a democratic society it must correspond to a ‘pressing social need’, be proportionate to the legitimate aim pursued, and the reasons adduced by the State must be ‘relevant and sufficient.’ See *Handyside*, paras. 48-50; *The Sunday Times*, para. 62

<sup>367</sup> Barendt (n 27) at 66

capable of precise formulation,”<sup>368</sup> whilst Lester has remarked that, “the concept of the margin of appreciation has become as slippery and elusive as an eel.”<sup>369</sup> It is unsurprising, therefore, that through the application of this ‘elusive’ doctrine the Court has produced a series of judgments concerning not only freedom of expression in general, but the freedom of artistic expression in particular, that are poorly reasoned at best and contradictory at worst.

Key to the concept of the margin of appreciation is the idea of subsidiarity or deference and as such it is fundamentally concerned with the relationship between the Court and the national authorities.<sup>370</sup> Indeed, Marks has described this relationship as being one of the hallmarks of the model of democracy envisaged by the Convention’s drafters.<sup>371</sup> Moreover, that the Court should be sympathetic towards a practice of deference finds some basis in Article 1 of the Convention itself which stipulates that, “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in...this Convention.”<sup>372</sup> As will become clear in the following discussion of the Court’s case law, the Court has thus recognised that it is for the national authorities to make the *initial* assessment of whether its actions complied with its obligations under the ECHR, albeit whilst simultaneously acknowledging that this deference goes hand in hand with European supervision.<sup>373</sup>

In this respect, for O’Donnell, the margin of appreciation doctrine is a form of judicial review, in effect governing the degree to which the Court will scrutinise the practice of a State.<sup>374</sup> Under such a view, the margin of appreciation may therefore be considered as a doctrine of judicial self-restraint.<sup>375</sup> As Hutchinson confirms, “[t]he margin of appreciation then is more a matter of who takes the decisions, *rather than what those decisions might be*.”<sup>376</sup> It will be argued, moreover, that the manner in which the Court has employed the

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<sup>368</sup> Morrisson, C. *Margin of appreciation in human rights law* 6 *Human Rights Journal* 263 (1973) at 284

<sup>369</sup> Lester, A. *Universality versus subsidiarity: A reply*, (1998) EHRLR 73 at 75

<sup>370</sup> Letsas, G. *A Theory of Interpretation of the European Convention on Human Rights* (2007) 80-98. See also, Barendt (n 27) at 66, who argues that the doctrine emerged from the fact that the ECtHR is a supra-national court.

<sup>371</sup> Letsas (n 370) at 2-3

<sup>372</sup> Art. 1 ECHR (1950)

<sup>373</sup> See, for example, *Handyside*, paras 48-49 (emphasis added)

<sup>374</sup> O’Donnell, T. *The margin of appreciation doctrine: Standards in the jurisprudence of the European Court of Human Rights* (1982) HRQ 474 at 475

<sup>375</sup> Morrisson (n 368) at 275

<sup>376</sup> Hutchinson, M. *The margin of appreciation doctrine in the European Court of Human Rights* (1999) 48 ICLQ 638 at 640 (emphasis added)

margin of appreciation inherently weakens European supervision to the point where majoritarian values are given precedence over and above the individual's right to freedom of (artistic) expression, without a proper analysis grounded in the liberal and egalitarian values that the Convention rights may be seen to promote. Given art's tendency to provoke and instil agitation of social norms, the Court's application of the margin of appreciation may therefore be considered to be an underlying factor contributing to artistic expression's relatively under-protected protected status within Article 10.

The application of the margin of appreciation as a tool for deference first emerged in the Court's case law concerning derogations from the Convention in times of emergency under Article 15.<sup>377</sup> Subsequently, the concept was transferred to cases in which it was considered that there was no consensus between member states on the issue at hand.<sup>378</sup> Accordingly, as Letsas has summarised, "the Court's standard approach...has been that the less consensus there is among Contracting States on the human rights issue raised by the applicant, the better placed the national authorities are to decide on it and the more deferential the Court should be towards them in its final judgement."<sup>379</sup> In other words, the margin of appreciation afforded to national authorities is variable depending on the (perceived) extent of European consensus regarding the issue at hand.

Hutchinson suggests that the margin of appreciation, therefore, ought to be considered as an *area of compliance*.<sup>380</sup> This position contrasts with that put forward by Mahoney, who maintains that the Convention standards act as a base or lower threshold, with the margin of appreciation being the area above that base in which the State is able to exercise discretion.<sup>381</sup> Mahoney's model does not, however, neatly correlate with the Court's practice.<sup>382</sup> Indeed, if the Court were to actually engage in determining a minimum, base-level, it ought to be fairly clear – if not in the abstract then at least in specific cases – what that minimum level of protection actually is.<sup>383</sup> Instead, as may be gleaned from the

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<sup>377</sup> For a survey of the margin of appreciation doctrine's early development see Yourow, H.C. *The Margin of Appreciation in the Dynamics of European Human Rights Jurisprudence*, Martinus Nijhoff Publishers (1996) esp. at 15-24

<sup>378</sup> See Yourow (n 377) at 30-31, where it is noted that the 'consensus standard' first appeared in the (non-Article 10) *Belgian Linguistic* case of 1968.

<sup>379</sup> Letsas (n 370) at 120-121

<sup>380</sup> Hutchinson (n 376) at 644

<sup>381</sup> Mahoney, P. *Universality versus subsidiarity in the Strasbourg case law on free speech: Explaining some recent judgements* (1997) EHRLR 364 at 369

<sup>382</sup> Hutchinson (n 376) at 642

<sup>383</sup> Hutchinson (n 376) at 643

following case law overview, the Court usually proffers, as Hutchinson observes, vague and general insights in to the situation put before it.<sup>384</sup>

Furthermore, Hutchinson contends that the ‘base-model’ proposed by Mahoney is further flawed by the fact that, as has been noted above, the Court usually employs the margin of appreciation to *defer* judgement; in effect leaving it to the national authorities (rather than the Court *per se*) to determine what the minimum standard of human rights protection in a given case actually is.<sup>385</sup> It is, then, the very variability of the doctrine of the margin of appreciation as applied by the Court that necessarily rules out Mahoney’s ‘base-model’ as an accurate portrayal of the Court’s practice. As Hutchinson indeed points out in summary, “[t]here would be little point in the Court affording a particularly wide margin in some particular case, if the actual borderline between breach and compliance was fixed.”<sup>386</sup>

Under Hutchinson’s preferred model, then, there is a central norm surrounded by the area of compliance within which the State enjoys a certain discretion in how it interprets and applies its Convention obligations. This model, whilst resembling more closely the actual practice of the Court, does suffer from one significant setback, namely that the central norm must necessarily remain unarticulated.<sup>387</sup> Otherwise, it is argued, through its judgements, the Court might inadvertently indicate a ‘best practice’ that differs from the actual course of action taken by the national authority. The seeking to avoid such discrepancies therefore goes some way to explaining the Court’s preference of couching its judgements in wide and general terms.<sup>388</sup> As we shall later see, this is especially evident in the Court’s reasoning in cases concerning artistic expression. For instance, in *Otto-Preminger-Institut* and *Wingrove*, in deferring judgement to the national authorities, the Court offered no reference as to what the expected standard actually was, instead stipulating only that the action taken was *within* the authority’s margin of appreciation or discretion. There is, running throughout its judgments, little sense of the Court attempting to delineate the actual boundaries of that margin. It is perhaps, therefore, with this in mind that Lester has consequently denounced the margin of appreciation as a ‘standardless doctrine.’<sup>389</sup>

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<sup>384</sup> Hutchinson (n 376) at 643

<sup>385</sup> Hutchinson (n 376) at 643

<sup>386</sup> Hutchinson (n 376) at 643

<sup>387</sup> Hutchinson (n 376) at 645

<sup>388</sup> Hutchinson (n 376) at 645

<sup>389</sup> Lester (n 369) at 75-76

Disparities within the discussions as to the precise, practical definition of the doctrine notwithstanding, it is clear that the margin of appreciation is variable in its application. More specifically, in noting that the margin of appreciation's scope is affected by the degree of consensus existing on the issue at hand, it is possible to surmise that, as suggested by Robertson and Merrills' analysis, the Court has granted a wider margin of appreciation (thus limiting the extent of its scrutiny) in relation to the protection of morals than in relation to the other limitation clauses found in Article 10(2).<sup>390</sup> Whilst this suggestion will be explored in further detail below in the analysis of the Court's case law concerning specifically artistic expression, for present purposes the idea that the margin of appreciation varies depending on the limitation clause relied upon by the State may be exemplified by comparing *Handyside* with *The Sunday Times* case.<sup>391</sup>

The *Handyside* case concerned a book aimed at adolescents that contained sections on sex and drugs that were deemed obscene by the national authorities under the relevant obscenity laws. Of particular significance in its finding that there had been no violation of Article 10 was the Court's acceptance that, "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals."<sup>392</sup> Consequently, the State authorities were deemed better placed than an international judge to determine the necessary requirements. A wide margin of appreciation was thus afforded to the national authorities to determine the best route to compliance with its Convention obligation which, incidentally, they were found to have not exceeded.

By comparison, in *The Sunday Times* case it was found that, unlike in cases concerning morals, there was, "a fairly substantial measure of common ground" with regards the maintenance of the authority of the judiciary.<sup>393</sup> Here, there was felt to be a far greater degree of objectivity as to the obligations required of the State due to the supposedly greater European consensus on the issue. The margin of appreciation was thus construed as being narrower than in *Handyside* and, as such, the Court felt confident in finding that the national authorities had *overstepped* its margin of appreciation, thereby paving the way to the Court's conclusion that there had been a violation of Article 10. Accordingly, by comparing *Handyside* with *The Sunday Times* case, the margin of appreciation can be seen to fit

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<sup>390</sup> Robertson, A. and Merrills, J. *Human Rights in Europe: A Study of the European Convention on Human Rights* (1993) at 152

<sup>391</sup> *Sunday Times v. United Kingdom* (1979-80) 2 EHRR 245

<sup>392</sup> *Handyside*, para 48

<sup>393</sup> *Sunday Times*, para 59

Hutchinson’s model of the doctrine as a variable area of compliance that is either expanded or contracted depending on the purported consensus regarding the matter at hand in light of the limitation clause relied on by the State. Moreover, as will become apparent below, that the variability of the margin of appreciation implicitly obscures the expected standard required by the Court for freedom of expression’s protection may be seen to inform much of the criticism of the Court’s Article 10 jurisprudence in general, the effect of which has led to specifically artistic expression’s precarious positioning within Article 10.

Key to appreciating the limited scrutiny associated with the application of a wide margin of appreciation and artistic expression’s subsequently precarious status within the hierarchy of expression that has emerged from the Court’s Article 10 jurisprudence, is an understanding of the impact that the margin of appreciation has on the Court’s considerations regarding the necessity and proportionality of the interference. The doctrine of proportionality has been described as, “the other side of the margin of appreciation,”<sup>394</sup> such that its application is necessarily affected by the width of the margin of appreciation granted to the State in any given case. In other words, the Court’s deference to a State’s decision following the employment of a wide margin of appreciation necessarily precludes the Court from engaging in a meaningful assessment of the proportionality of the State’s interference. More specifically, when determining whether a given interference with Article 10 was, indeed, ‘necessary in a democratic society’, the implementation of a wide margin of appreciation prevents the Court from incorporating within its analysis adequate reference the liberal values inherent in the Convention, to the detriment of artistic expression.<sup>395</sup>

That there is a correlation between the breadth of the margin of appreciation and the adequacy of the Court’s assessment of the interference’s necessity and proportionality is clear with reference to the case law. Whereas, under Fenwick and Phillipson’s analysis, in the *Sunday Times* case – in which a narrow margin of appreciation was applied – the Court directed itself along the lines of whether the interference was something akin to being ‘absolutely necessary’, under the wide margin of appreciation found in *Müller*, the Court simply asked whether the Swiss courts were ‘entitled’ to believe that the interference was

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<sup>394</sup> Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* cited in Letsas (n 370) at 86

<sup>395</sup> See, for example, Letsas (n 370) at 17

necessary.<sup>396</sup> As Fenwick and Phillipson go on to point out, the question asked in *Müller* is markedly different to that asked in *Sunday Times*.<sup>397</sup>

It is evident, therefore, that the application of a wide margin of appreciation has significant ramifications for the protection of expression vis-à-vis the degree of scrutiny with which the Court will approach its determination of whether the interference was ultimately necessary in a democratic society. Moreover, it is suggested that the ramifications of the margin of appreciation's expansion in instances concerning morality is of acute concern for specifically artistic expression. In as much as artists consider themselves to be, as Turner posits, something of a 'consciousness of society'<sup>398</sup> their works will (perhaps inevitably) have moral implications. As such, under the Court's application of the margin of appreciation doctrine, artistic expression suffers an implicit and indirect disadvantage precisely because of art's inherent value. It is therefore important to attempt to distil, from its jurisprudence, the core values pertaining to the Court's appreciation of Article 10. In so doing, not only will artistic expression's precarious protection within Article 10 be further emphasised but a foundation will be established from which to advocate for art and artistic expression's greater protection in future cases.

### **3.4.3 Distilling the core values of Article 10: Political Expression**

That political expression can be seen to lie at the apex of the European Court of Human Rights can be seen throughout its case law, dating back to at least 1986 and the seminal case of *Lingens v. Austria*. The case of *Lingens* concerned the publication of two articles entitled 'The Peter Case' and 'Reconciliation with the Nazis, but how?' both of which featured in the political magazine *Profil*.<sup>399</sup> The articles were published against the backdrop of a recent general election, which had led to talks being held between Mr Peter (President of the Austrian Liberal Party) and Mr Kreisky (Chancellor and President of the Austrian Socialist Party) over the possible formation of a coalition government. The former article made particular emphasis of Mr Peter's membership of the first SS infantry brigade during the Second World War, pointing out that whilst Mr Peter must be allowed the presumption of innocence, the particular SS brigade in question had been involved in

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<sup>396</sup> See Fenwick, H. and Phillipson, G. *Media freedom under the Human Rights Act*, OUP (2006) at 58

<sup>397</sup> Fenwick and Phillipson (n 396) at 58

<sup>398</sup> Turner (n 297) at 314

<sup>399</sup> *Lingens v. Austria* 8 EHRR 103 (1986), paras 12-19

several massacres of civilians behind the German lines in Russia.<sup>400</sup> Accordingly, in the opinion of Mr Lingens, Mr Peter was unsuited to be an Austrian politician.<sup>401</sup> Furthermore, the article went on to criticise Mr Kreisky, accusing him of protecting Mr Peter, as well as other former members of the SS for political purposes.<sup>402</sup>

The second article, *Reconciliation with the Nazis, but how?*, again criticised Mr Kreisky for his support of Mr Peter in addition to his accommodating attitude towards former Nazis in Austrian politics more generally.<sup>403</sup> The article went on to make general arguments concerning Austria's history and relationship with the Nazism.<sup>404</sup> In particular, comment was made on Austria's, collective inability to come to terms with its past, such that the possibility remained open of falling into a fascist movement in the future.<sup>405</sup> Moreover, according to the European Court of Human Rights' judgment, "In the author's opinion, by sheltering behind the philosophic alternative between collective guilt and collective innocence the Austrians had avoided facing up to a real, discernible and assessable guilt."<sup>406</sup> Additionally, the point was stressed that one had to volunteer to join the special units of the SS, in contrast to the regular forces of army.<sup>407</sup> The implication presumably being that Mr Peter was in some way more morally responsible for the atrocities committed by the Nazis than others, and therefore unsuited for public life. Finally, the article commented on Austrian political parties more generally, criticising them for the presence of Nazis in the high echelons of their parties.<sup>408</sup> That the articles may be regarded as broadly political, both in terms of their content and the medium through which the expression was made, is therefore clear.

Perhaps surprisingly, it was Mr Kreisky and not Mr Peter who brought the private prosecution in the present case, claiming certain passages of Mr Lingens' articles to be defamatory. In the domestic courts it was found that the expressions accusing Mr Kreisky of, "the basest opportunism" in addition to being "immoral" and "undignified" were defamatory within the meaning of the relevant domestic legislation.<sup>409</sup> In so finding, it was

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<sup>400</sup> *Lingens* (n 399) at paras 9 and 12 (It is important to stress that Mr Peter vehemently denied involvement in those massacres)

<sup>401</sup> *Lingens* (n 399) at para. 12

<sup>402</sup> *Lingens* (n 399) at para. 12

<sup>403</sup> *Lingens* (n 399) at para. 14

<sup>404</sup> *Lingens* (n 399) at paras. 14-19

<sup>405</sup> *Lingens* (n 399) at para. 15

<sup>406</sup> *Lingens* (n 399) at para. 16

<sup>407</sup> *Lingens* (n 399) at para. 17

<sup>408</sup> *Lingens* (n 399) at para. 18

<sup>409</sup> *Lingens* (n 399) at para. 21



stressed that Mr Lingens had not produced any evidence to ascertain the truth of these expressions and in so doing, failed to take account of Mr Lingens' argument that those expressions were value-judgments incapable of being verified in the normal sense.<sup>410</sup>

In a statement highly reminiscent of Meiklejohn's underlying theory of freedom of expression,<sup>411</sup> the Court pronounced that, "Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders."<sup>412</sup> Furthermore, and of particular relevance for the present purposes of distilling the underlying values of freedom of expression to inform the European Court of Human Rights' application of Article 10, the judgment went on to assert that, "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention."<sup>413</sup> Thus, the infamous *Handyside* dictum, and its guarantees for offensive, shocking and disturbing expression, was said to be of *particular* importance to the freedom of the press.<sup>414</sup>

By articulating the core value of Article 10 – within the context of the European Convention on Human Rights' commitment to democracy more generally – in terms of the 'freedom of political debate' the European Court of Human Rights proceeded with a *de facto* reduction in the margin of appreciation considered to be applicable to the State in such instances, thereby enabling a greater scrutiny and thus protection of Mr Lingens' expression. Accordingly, the Court went on to assert that whilst the protection of the 'reputation of others' found within the limitation clauses of Article 10(2) certainly extended to politicians, those in the public eye had to be more tolerant of criticism than private individuals, such that the former's right to protection of their reputation had to be weighed against the interests of free public debate.<sup>415</sup>

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<sup>410</sup> *Lingens* (n 399) at para. 26

<sup>411</sup> See, for example, Meiklejohn, A. *The First Amendment Is An Absolute* (1961) Sup. Ct. Rev. 245

<sup>412</sup> *Lingens* (n 399) at para. 42

<sup>413</sup> *Lingens* (n 399) at para. 42

<sup>414</sup> *Lingens* (n 399) at para. 41 (citing *Handyside v. UK*, para. 49 in which the European Court of Human Rights surmised that the freedom of expression contained in Article 10 of the European Convention on Human Rights, "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to [the limitation clauses of Article 10(2)] it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

<sup>415</sup> *Lingens* (n 399) at para. 42

Accordingly, Mr Lingens' criticisms of Mr Kreisky were subject to the limitations of Article 10(2) and it was for the Court to engage in an assessment of whether the criminal conviction was a proportionate response given the circumstances. In finding the conviction to be unnecessary in a democratic society the Court disagreed with the assessment made by the domestic courts that, since there were numerous ways in which one might interpret Mr Kreisky's behaviour, to assert one possible interpretation to the exclusion of others was illogical, such that the statements amounted to defamation.<sup>416</sup> In essence, the government sought to argue that Mr Lingens had failed to establish proof that his 'interpretation' was the only objective conclusion that could be reached.

Instead, however, the European Court of Human Rights maintained that, "a careful distinction needs to be made between facts and value-judgments," before going on to explain that, "The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof."<sup>417</sup> Since the facts from which Mr Lingens derived his conclusion were undisputed and the article written in good faith, the Court considered that Mr Lingens had not exceeded the protective scope of Article 10.<sup>418</sup> Moreover, the Court stressed that the domestic legislation that formed the basis of the applicant's conviction, which by its very nature required an onus of truth was inherently in tension with the right to freedom of thought, which in turn is a fundamental component of Article 10.<sup>419</sup>

The Court's judgement in the *Lingens* case can therefore be seen to give particularly strong protection to freedom of expression, especially on matters of public interest, in which the underlying, preeminent value associated with Article 10's freedom of expression is seen to lie in the contribution to be made to a public discourse on matters of public interest. The strength of the protection is all the more striking given the fact that the decision was unanimous, with a bench consisting of eighteen judges. Moreover, in line with the theoretical framework for the variability of protecting expression derived from the theses of Blocher, Schauer and Sunstein, the rationale employed by the Court in *Lingens* will be seen to have had a significant impact on the categorisation of expression more generally, as clearly indicated by the development of its case law concerning commercial expression in which the proximity with which the expression is seen to contribute to the notion of public discourse is of considerable import.

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<sup>416</sup> *Lingens* (n 399) at paras. 24, 26, 29, and 46

<sup>417</sup> *Lingens* (n 399) at para. 46

<sup>418</sup> *Lingens* (n 399) at paras 21, 43, and 46

<sup>419</sup> *Lingens* (n 399) at para. 46

*Thorgier Thorgeirson v. Iceland* (1992)<sup>420</sup>

That political expression is seen to be of particular significance as a category of expression for the purposes of Article 10 is further evinced by the case of *Thorgier Thorgeirson v. Iceland*. In *Thorgeirson* the applicant, described in the judgment as a writer, wrote two articles for a daily newspaper on the subject of police brutality – following a number of allegations made in the press and the conviction of a police officer – in which he described the police, *inter alia*, as ‘wild beasts in uniform’ and ‘brutes and sadists’, for which he was subsequently convicted on the basis of defaming members of the police force.<sup>421</sup> During the period in question, the subject of the police’s behaviour was, as such, a topic of considerable public interest and discussion.

In its submissions, the government sought to argue that Mr Thorgeirson’s expression could not be described as falling within the ‘category of political discussion’ warranting an especially high level of protection before going on to proffer that ‘political discussion’ be described as the “direct or indirect participation by citizens in the decision-making process in a democratic society.”<sup>422</sup> As such, comparisons may be drawn between the argument advanced by the Icelandic government and a narrow reading of the Meiklejohnian position outlined in Chapter One, locating the value of freedom of expression in its contribution to the democratic process.<sup>423</sup>

In refusing to accept the government’s assertions, the European Court of Human Rights instead placed considerable emphasis on the form and medium through which the expression was made, noting that, “[r]egard must...be had to the pre-eminent role of the press in a State governed by the rule of law.”<sup>424</sup> Moreover, the Court asserted that the government had erred in its argument that a distinction be drawn between political discussion and other types of discussion, stipulating that, “there is no warrant in [the] case

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<sup>420</sup> *Thorgier Thorgeirson v. Iceland* (1992) (HUDOC)

<sup>421</sup> *Thorgeirson*, paras. 7-28

<sup>422</sup> *Thorgeirson*, para. 61

<sup>423</sup> However, it should be remembered that Meiklejohn (n 162) himself advocated a wider appreciation than a facial reading of his position might infer such as to incorporate the arts in order to promote the qualities needed of an active citizen when making political decisions in the narrower sense.

<sup>424</sup> *Thorgeirson*, para. 63

law for distinguishing, in the manner suggested by the government, between political discussion and discussion of other matters of public concern.”<sup>425</sup>

That the European Court of Human Rights refused to be drawn on the Icelandic government’s attempts to attribute a lower degree of protection to Mr Thorgeirson’s expression on account of distinguishing it from the category of political expression proper, is therefore of some significance for the present purposes of distilling the Court’s methodology regarding the categorisation of expression more generally. Whilst the Court’s rationale should not be confused with a refusal to distinguish between different types of expression *per se* it remains indicative of the importance of expression’s contribution to a discussion of matters of public concern that will become especially apparent in the discussion to follow regarding commercial expression. Accordingly, given the ‘pre-eminent role’ played by the press in a democratic society and the subject matter addressed in the articles being of “serious public concern” the Court concluded, vis-à-vis a close analysis of the State interference’s proportionality and necessity, that there had been a violation of Article 10.<sup>426</sup>

#### ***Ceylan v. Turkey (1999)***<sup>427</sup>

The applicant in the case of *Ceylan* – the president of the petroleum workers’ union – wrote an article that was subsequently published in the weekly newspaper *New Land* in July of 1991.<sup>428</sup> The article – entitled *The time has come for workers to speak out – tomorrow it will be too late* – set out Mr Ceylan’s position concerning the plight of the Kurdish community both domestically, with regard to the “steadily intensifying State terrorism” of the Turkish government, as well as internationally at the hands of Saddam Hussein and ‘US imperialism’.<sup>429</sup> In particular, Mr Ceylan sought to criticise the intention and application of the Prevention of Terrorism Act, legislation that he contended, “is aimed at crushing not only the struggle of the Kurdish people, but the struggle of the whole working class and proletariat for subsistence, for freedom and for democracy.”<sup>430</sup> In that connection, and in response to the State’s aim of “gag[ging] and suffocate[ing]” the Kurdish people, Mr

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<sup>425</sup> *Thorgeirson*, para. 64

<sup>426</sup> *Thorgeirson*, paras. 67-70

<sup>427</sup> *Ceylan v. Turkey* (1999) (HUDOC)

<sup>428</sup> *Ceylan*, para. 8

<sup>429</sup> *Ceylan*, para. 8

<sup>430</sup> *Ceylan*, para. 8

Ceylan concluded his article by, “calling on all our people and all the forces of democracy to take an active part in this struggle.”<sup>431</sup>

Following the publication of the article, Mr Ceylan was convicted by the Istanbul National Security Court of the offence of “incit[ing]...people to hatred or hostility on the basis of distinction between social classes, races, religions, denominations or regions”, a charge that brought with it heightened sanctions on account of it having been made by means of mass communication.<sup>432</sup> In reaching the conclusion that the applicant had incited the population to hatred and hostility by making distinctions based on ethnic or regional origin or social class the court made particular note of those passages in the article which it interpreted as suggesting that, “...genocide [was] being carried out against the Kurds in Turkey...” and that an attempt was being made to, “...gag and suffocate the Kurdish people,” a conclusion that the appeal court upheld.<sup>433</sup> As a result, Mr Ceylan served a prison sentence of one year and eight months, in addition to being fined 100,000 Turkish liras.<sup>434</sup> Moreover, as result of the conviction, Mr Ceylan was legally unable to remain in office as a union president as well as losing certain civil and political rights, including the right to establish ‘associations’, trade unions or political parties or indeed even join a political party, in addition to being unable to stand for election to Parliament.<sup>435</sup>

By an overwhelming majority of sixteen votes to one, the Court, sitting as a Grand Chamber, held there to have been a violation of Mr Ceylan’s right to freedom of expression under Article 10 of the European Convention on Human Rights. In its assessment of the necessity of the interference as a means to ensuring the legitimate aims relied on by the State, the Court noted that, “The article in issue took the form of a political speech, both in its content and in the kind of terms employed.”<sup>436</sup> In this regard, the applicant’s use of “words with Marxist connotations,” was interpreted by the Court as an attempted explanation of the upsurge in violence in certain areas of Turkey, with the main thrust of Mr Ceylan’s argument being construed as imploring the Kurdish movement to join “a general struggle for freedom and democracy being waged by the Turkish working class and its economic and democratic organisations.”<sup>437</sup>

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<sup>431</sup> *Ceylan, op cit*, para. 8

<sup>432</sup> *Ceylan, op cit*, para. 11. See paras. 15 and 16 for details of the Criminal Code

<sup>433</sup> *Ceylan, op cit*, paras. 11-13

<sup>434</sup> *Ceylan, op cit*, paras. 11 and 14

<sup>435</sup> *Ceylan, op cit*, paras. 14 and 17

<sup>436</sup> *Ceylan, op cit*, para. 33

<sup>437</sup> *Ceylan, op cit*, para. 33

Whilst the style of the article was acknowledged as being ‘virulent’ and ‘acerbic’ – in particular with regard to the references to “bloody massacres” and “State terrorism” – the Court nonetheless stressed that, “there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate of public interest.”<sup>438</sup> Furthermore, after recognising that, “the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even politician”, the Court went on to remark that, “[i]n a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.”<sup>439</sup> Accordingly, whilst the State is charged with the responsibility of guaranteeing public order, such that it enjoys a wider margin of appreciation in instances of incitation to violence, and whilst the Court acknowledged the particular challenges facing Turkey at the time (as evinced by the sheer volume of cases presented to the Court emanating from Turkey at the material time), it remained unconvinced that the actions taken were proportionate to aims pursued.<sup>440</sup>

Thus, with regard to the limited scope available to the State with regards to placing restrictions on political expression, the Court placed particular emphasis on Mr Ceylan’s status as a union-leader, a position in which he was a, “player on the Turkish political scene” as well as the observation that, although virulent in tone, the article fell short of encouraging the use of violence or armed resistance or insurrection.<sup>441</sup> Furthermore, the nature and severity of the penalties imposed on Mr Ceylan led the court to conclude that the conviction was disproportionate to the aims pursued and thus was not necessary in a democratic society.<sup>442</sup>

Although agreeing with the Court’s conclusion that there had indeed been a breach of Article 10, Judges Palm, Tulkens, Fischbach, Casadevall and Greve reached the conclusion by different means, subscribing instead to the methodology proposed by Judge Palm in her partial dissent in the case of *Surek v. Turkey (No. 1)*. Accordingly, for the concurring judges, too great a weight was ascribed to, “the form of words used in the publication and insufficient attention [paid] to the general context in which the words were used and their

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<sup>438</sup> *Ceylan, op cit*, paras. 33-34 (Citing *Wingrove v. UK*, para. 58)

<sup>439</sup> *Ceylan, op cit*, para. 34

<sup>440</sup> *Ceylan, op cit*, para. 34-38

<sup>441</sup> *Ceylan, op cit*, para. 36

<sup>442</sup> *Ceylan, op cit*, para. 38

likely impact.”<sup>443</sup> Thus, “An approach which is more in keeping with the wide protection afforded to political speech in the Court’s case-law is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered.”<sup>444</sup> In this regard and in the contextual assessment of a given expression, it was proposed that a more nuanced analysis of various factors, including the speaker’s intentions regarding the incitement of violence; speaker’s status, the impact of the medium, and proximity to violence (akin to Mill’s corn dealer example) is required in order to distinguish the merely offensive and shocking language that is protected under Article 10 and that expression which is not.<sup>445</sup>

#### **3.4.4 Overview of the primacy of political expression**

The brief overview of case law concerning political expression above sought to emphasis the primacy with which political expression is considered within the European Court of Human Rights’ interpretation of Article 10. Accordingly, whilst the Court cannot be said to have developed a position approximating that of a categorical-absolutist position – according to which the recognition of a given expression as ‘political’ would automatically guarantee its protection – political expression nevertheless can be seen to enjoy a privileged position within the framework of Article 10. Thus, political expression is considered to lie at the core of the values imbued in Article 10 which in turn works to reduce the margin of appreciation open to State authorities in the limitation of an individual’s right to freedom of expression vis-à-vis the ‘limited scope...for restrictions on political speech or on debate on matters of public interest mantra; the concomitant result being a thorough judicial examination of the interference at hand and a *de facto* high level of protection for political expression.

In order to place the European Court of Human Rights’ approach to categorising expression and the attribution of varying degrees of protection in a more comprehensive context, in which the significance of the primacy placed on political expression is acutely seen, it is instructive to consider the case law concerning commercial expression. By noting the extent to which a given example of commercial expression can be regarded as aligning with

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<sup>443</sup> *Ceylan, op cit*, Joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve, para. 2

<sup>444</sup> *Ceylan, op cit*, Joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve, para. 3

<sup>445</sup> *Ceylan, op cit*, Joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve, paras. 4-5

Article 10 core values of contributing to public discourse on matters of public interest the theoretical approach underpinning the European Court of Human Rights doctrine on categorising expression will, accordingly, be seen to accord substantially with the these provided by Blocher, Schauer and Sunstein.

### 3.4.5 Distilling the core values of Article 10: Commercial Expression

#### *X. and Church of Scientology v. Sweden (1979)*<sup>446</sup>

Whilst commercial expression was not explicitly recognised as falling within Article 10's ambit until the landmark case of *Markt Intern* in 1989, two earlier decisions – one pertaining to the now defunct Commission, the other a judgment of the Court itself – are particularly worthy of note. Indeed, the inclusion of *X. and Church of Scientology* and *Barthold* in the survey of the Court's case law is critical, for the sentiments enounced therein can be heard reverberating throughout the Court's subsequent case law.

Some eight years prior to the Court's decision in *Markt Intern* – in which the European Court of Human Rights first confirmed commercial expression's existence within the contours of Article 10 – the Commission had occasion to consider the novel issue of commercial expression and its relationship to freedom of expression within Article 10 more generally in the case of *X. and Church of Scientology v. Sweden*. There, following complaints to the Consumer Ombudsman, an injunction was obtained prohibiting the applicants (a pastor of the Church of Scientology and the Church of Scientology itself) from using 'certain passages' in an advertisement contained within a periodical of the Church of Scientology which was circulated among the Church's members.<sup>447</sup> The advertisement in question was for an 'E-meter' – a device said to indicate whether or not the user has been 'relieved of the spiritual impediment of his sins'<sup>448</sup> – and read as follows:

Scientology technology of today demands that you have your own E-meter. The E-meter (Hubbard Electrometer) is an electronic instrument for measuring the mental state of an individual and changes of the state. There exists no way to clear without an E-meter. Price: 850 CR. For international members 20% discount: 780 CR.

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<sup>446</sup> *X. and Church of Scientology v. Sweden* (1979) (HUDOC)

<sup>447</sup> *X. and Church of Scientology v. Sweden*, p. 2

<sup>448</sup> *X. and Church of Scientology v. Sweden*, p. 2



Fundamental in its reaching the conclusion that the State's interference with the applicant's right to freedom of expression was not disproportionate – the concomitant result being that the application was declared inadmissible – was the Commission's willingness to endorse a lower level of scrutiny with regards to whether or not the interference was necessary in a democratic society. In particular the Commission sought to justify this lower level of scrutiny on two grounds. Firstly, the Commission stipulated that 'significance' be attached to the fact that the 'ideas' expressed in the present case were communicated in the context of a commercial advertisement.<sup>449</sup> As such, whilst the Commission accepted that the commercial context of the expression did not preclude Article 10 protection *per se*, the level of protection to be afforded to such expression was nevertheless explicitly considered to be less than that afforded to political expression. In particular, the Commission asserted that:

[T]he level of protection must be less than that accorded to the expression of 'political' ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention are chiefly concerned.<sup>450</sup>

Thus, the lower protection of commercial expression is justified by Commission, in accordance to the thesis outlined by Blocher, Schauer and Sunstein, with reference to the proximity of the expression to the core values of Article 10, identified here as being the promotion of 'political ideas', albeit broadly construed.

Secondly, in addition to doctrinal considerations of the proximity of commercial expression to the values of freedom of expression more generally, the Commission proffered an institutional argument in justification of the lower level of scrutiny to be applied with regards to interferences with commercial expression in this particular case. Accordingly, a lower level of judicial scrutiny of the domestic courts' rationale was considered apt given the empirical observation that there existed in most European countries legislation allowing for the restriction of the free flow of commercial ideas in the interest of protecting consumers from 'misleading or deceptive practices'.<sup>451</sup> In other words, the State's margin of appreciation was considered to be relatively wide.

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<sup>449</sup> The word 'ideas' is enclosed in inverted commas in the Commission's decision, possibly suggesting a degree of scepticism as to the nature of commercial expression's relationship with other categories of expression in its very ability to convey 'ideas' as conventionally understood.

<sup>450</sup> *X. and Church of Scientology v. Sweden*, *op cit*, p. 73 (citing *Handyside v. UK*, para. 49)

<sup>451</sup> *X. and Church of Scientology v. Sweden*, *op cit*, p. 6

Therefore, given both the nature of the expression and the level of pan-European uniformity on the specific issue of misleading and deceptive advertising, the level of scrutiny which the Commission was willing to employ was tempered by its attributing ‘considerable weight’ to the analysis and findings of the domestic court.<sup>452</sup> Thus, since the domestic court had justified the granting of the injunction on various and, presumably, relevant grounds – including the protection of consumers (especially in the religious context in which the consumer was considered to be “particularly susceptible to selling arguments”) from misleading advertising<sup>453</sup> – the Commission was reluctant to question the necessity of the interference. Indeed, this reluctance was further strengthened by the acknowledgment that the domestic court had pursued a measure that was, in the circumstances, the least restrictive to freedom of expression open to it. In this regard, the Commission noted that the applicants had not been prohibited from advertising the E-meter *per se*, the injunction merely stipulating that ‘certain passages’ be proscribed, as well as the fact that the injunction had not been accompanied by a fine.<sup>454</sup>

Accordingly, whilst the rationale employed by the Commission in *X. and Church of Scientology v. Sweden* can be seen to evince the variability of protection in accordance with the theoretical framework ascribed by the likes of Blocher, Schauer and Sunstein, there remains a degree of confusion in which the distinction between the right’s coverage and its protection appears to have been somewhat blurred. Whilst the Commission’s analysis was indeed framed within the theoretical basis outlined above – such that the expression was not deemed to be unprotected *per se* albeit subject to a lesser degree of protection than political expression – the Commission’s refusal to actively engage in an assessment of the necessity and proportionality of the State’s interference with the applicant’s freedom of expression vis-à-vis the emplacement of a wide margin of appreciation, may be regarded as a *de facto* refusal to accept commercial expression as expression for the purposes of Article 10.

#### ***Barthold v. Germany* (1985)<sup>455</sup>**

Following the Commission’s decision that the Article 10 application in *X. and Church of Scientology v. Sweden* was manifestly ill-founded, the first opportunity for the Court to

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<sup>452</sup> *X. and Church of Scientology v. Sweden*, *op cit*, p. 7 (emphasis added)

<sup>453</sup> *X. and Church of Scientology v. Sweden*, *op cit*, p. 7

<sup>454</sup> *X. and Church of Scientology v. Sweden*, *op cit*, p. 7

<sup>455</sup> *Barthold v. Germany* (1985) (HUDOC)

address the issue of commercial expression came with the case of *Barthold*. Predating *Markt Intern* by some four years, the approach taken by the Court in *Barthold* remains instructive in going some way to explaining the treatment of commercial expression in Strasbourg. Accordingly, the value placed on the expression's capacity to contribute to public discourse, absent in *X. and Church of Scientology v. Sweden* above, will be seen to be instructive in prompting greater judicial scrutiny by the European Court of Human Rights and a concomitant increase in level of protection.

The applicant, Dr Barthold, was a veterinary surgeon whose practice, in contrast to most other veterinary practices in the Hamburg area, offered a twenty-four-hour emergency service. In his capacity as a member of the Hamburg Veterinary Surgeons' Council, the applicant had long campaigned for a compulsory, regular round-the-clock emergency service based on a rota system among all the practices in Hamburg, but to no avail.<sup>456</sup> A journalist from a local daily newspaper wrote an article outlining the problem of seeking emergency veterinary treatment after normal working hours as well as noting proposals to introduce new legislation regulating night time veterinary services. The general issue was highlighted with reference to the plight of Shalen the cat whose owner, distressed after several unsuccessful attempts of finding a vet willing to treat Shalen after hours, 'struck lucky' in finding Dr Barthold. The article continued with the printing of portions of an interview with Dr Barthold in which he expressed his belief that there ought to be a regular veterinary service out with normal hours, as well as suggesting that there is a demand for such a service given that his clinic received between two and twelve calls per night.<sup>457</sup>

Following complaints from local veterinary surgeons, proceedings were initiated against Dr Barthold under unfair competition legislation, it being claimed that the article in question gave favourable publicity to Dr Barthold's clinic at the expense of other veterinary surgeries in the area. An injunction preventing Dr Barthold from reasserting passages from the impugned article was then subsequently upheld by the Court of Appeal.

In its assessment of the applicability of Article 10 to the facts of *Barthold*, the Court was confident in concluding that the present case fell within the scope of Article 10 without needing to ascertain whether or not commercial advertising *per se* was indeed covered by

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<sup>456</sup> *Barthold*, *op cit*, paras. 11-12

<sup>457</sup> *Barthold*, *op cit*, para. 13 (Fortunately, matters of freedom of expression aside, owing to the night service offered by Dr Barthold, Shalen the cat survived his unspecified ordeal.)

freedom of expression guarantees.<sup>458</sup> In its submissions to the Court, the government had argued that at least some elements of Dr Barthold's interview could not be said to concern the exchange of ideas of the sort protected by Article 10.<sup>459</sup> Nonetheless, the Court reasoned that, whilst there were indeed 'various components' to the article, including 'certain factual data and assertions regarding...[Dr Barthold]...and the running of his clinic,' it was not possible to dissociate those elements considered by the domestic courts as having a publicity-like or advertising effect from those in which Dr Barthold's 'opinion' or 'ideas' were being conveyed. In short, all the components comprised in the article made a whole, the underlying gist of which was described by the Court as, "the expression of 'opinions' and the imparting of 'information' on a topic of general interest."<sup>460</sup>

Moreover, that the expression in question fell on the side of expression of opinions on a matter of general interest, and thus within the accepted confines of Article 10, was further evinced, for the Court, by the fact that the expression was contained in the form of a newspaper article, written by a journalist, and not a commercial advertisement *per se*.<sup>461</sup> Accordingly, whilst the case of *Barthold* is therefore not, strictly speaking a case of commercial expression, the Court's approach in its determination of the applicability of Article 10 is interesting in as much that it may be seen as decisive, or at least influential, in the Court's subsequent reasoning concerning the more substantive aspects of the case.

Moving on to the substantive question of whether there had been a breach of Article 10 – it being confirmed that there was an interference,<sup>462</sup> that the interference was prescribed by law,<sup>463</sup> and that the interference pursued the legitimate aim of protecting the rights of others<sup>464</sup> – the Court held, by a majority of five votes to two that the interference in question was disproportionate to the legitimate aim pursued, and thus not necessary in a democratic society.<sup>465</sup> Underlying the Court's reasoning in reaching its decision was the development

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<sup>458</sup> Barthold, *op cit*, para.42

<sup>459</sup> Barthold, *op cit*, para. 40

<sup>460</sup> Barthold, *op cit*, para. 42

<sup>461</sup> Barthold, *op cit*, para. 42

<sup>462</sup> Barthold, *op cit*, para. 43

<sup>463</sup> Barthold, *op cit*, paras. 44-49

<sup>464</sup> Barthold, *op cit*, paras. 50-51. Somewhat bizarrely, the Government had tentatively sought to argue that, in addition, the interference sought to protect human health and public morals. Since the domestic courts had framed the issue within the sphere of unfair competition, with the injunction seeking to prevent an unfair advantage in the commercial context, the Court limited its analysis to that of the protection of the rights of others.

<sup>465</sup> Barthold, *op cit*, paras. 58-59

of its position, first set out in its consideration of the applicability of Article 10, with regards to the inherent nature or quality of the expression at issue.

Thus, whilst the Court appreciated that Dr Barthold had not been prohibited from publicly expressing his opinion on the issue at hand *per se*, the injunction nevertheless did seek to prevent him from drawing on his own professional experiences in order to highlight his concerns; the publicity gained from doing so was considered to be only incidental to the primary content and nature of the article such that the domestic courts were held to have failed to strike a fair balance between the two interests at stake.<sup>466</sup> Moreover, and at a more fundamental level, the Court was critical of the strict requirements concerning the advertising of the liberal professions, stipulating that they were, “not consonant with freedom of expression.”<sup>467</sup> In particular, the Court noted that the status quo would tend to discourage professionals’ contribution to public debate in addition to hampering the press in its role as ‘purveyor of information’ and as public watchdog. Again, it may reasonably be inferred that a given expression’s contribution (or perceived capacity to contribute) to public discourse is considered a fundamental prerequisite in prompting a greater judicial scrutiny of the interference and thus greater protection for freedom of expression.

In considering the Court’s approach to the categorisation of expression *Barthold* is, then, of keen interest. The reasoning employed by the Court is crucial for understanding the Court’s subsequent approach to commercial expression precisely, although somewhat paradoxically, because of its reluctance to consider the case through the lens of ‘commercial expression’. Indeed, aware that the Court would be forced to address the issue of commercial expression more directly in the future, Judge Pettiti’s insightful concurring opinion is obliquely critical of the Court’s reasoning, expressing his regret that the Court had not been more explicit on the issue. Affirming that commercial expression is ‘directly connected’ to freedom of expression, understood as the right to receive and impart information, Judge Pettiti went on to assert that:

The great issues of freedom of information, of a free market in broadcasting, of the use of communication satellites cannot be resolved without taking account of the phenomenon of advertising; for a total prohibition of advertising would amount to a prohibition of private broadcasting, by depriving the latter of its financial backing.<sup>468</sup>

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<sup>466</sup> *Barthold*, *op cit*, para. 58

<sup>467</sup> *Barthold*, *op cit*, para. 58

<sup>468</sup> *Barthold*, *op cit*, Concurring Opinion of Judge Pettiti

Thus, whilst conceding that regulation of commercial expression is indeed appropriate and, moreover, that it may be “afforded a different degree of protection to that granted in respect of the press”, Judge Pettiti nevertheless maintained that such expression still falls within the protection of Article 10. Accordingly, any restrictions on commercial expression, in line with the general Article 10 jurisprudence, ought to still be required to meet a ‘pressing social need’ and not be merely expedient.

Notwithstanding the divergence of methodology inherent in the positions taken by the majority in *Barthold* and of Judge Pettiti’s concurring opinion, the case of *Barthold* remains demonstrative of a broad convergence with the theoretical framework provided with reference to the theses of Blocher, Schauer and Sunstein: namely that the level of an expression’s protection will largely depend on its perceived correlation with the underlying values of Article 10. From the preceding discussion of the cases of *X. and Church of Scientology v. Sweden* and *Barthold* we may begin to surmise that the values inherent in Article 10, to which expression must be considered to align, can broadly be interpreted in line with the Meiklejohnian and Weinsteinian conception of freedom of expression as contribution to public discourse.

***Markt Intern Verlag GmbH and Klaus Beermann v. Germany* (1989)<sup>469</sup>**

With Judge Pettiti’s suggested rationale in mind – according to which commercial expression is said to relate directly with freedom of expression – it is time now to consider the seminal case of *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*. Like *Barthold*, unfair competition legislation prompted the granting of an injunction against Markt Intern, an organisation which, amongst other activities aimed at promoting the interests of small and medium sized retail businesses, published weekly news-sheets concerning specialised commercial sectors and general consumer information.

One such news-sheet contained a short article in which a named cosmetic beauty mail-order company was criticised after a customer, dissatisfied with the service she had received having returned an item, had brought the issue to the attention of Mark Intern. The article concluded with an appeal for any similar examples concerning the company in question to be reported to Mark Intern, noting that, “[t]he question of whether or not this

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<sup>469</sup> *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* (1989) (HUDOC)

incident is an isolated case or one of many is crucial for assessing the [mail-order company's] policy.”<sup>470</sup>

The mail-order company duly brought proceedings against Markt Intern under unfair competition laws, with the Federal Court ruling that Markt Intern refrain from the future publication of the statements made in the complained of article, with a failure to comply resulting in a fine or period of imprisonment. In reaching this decision, and in overturning the lower court's previous decision, the Federal Court reasoned that, by working to promote the interests of a certain commercial sector, Markt Intern had sought to undermine the interests of the appellant mail-order company such that it had not simply been acting as an organ of the press and that the unfair competition laws could therefore be said to apply.<sup>471</sup>

Notwithstanding the Government's argument that the nature of Markt Intern's activities placed the content of the impugned expression “at the extreme limit of Article 10's...field of application,” the Court accepted that the article, whose content was recognised as being commercial in its nature, could not be said to be excluded from the scope of Article 10.<sup>472</sup> Despite the article being addressed only to a limited, specialised audience and not the general public *per se*, Article 10 was still considered to be applicable, owing to the fact that its protective coverage, “does not apply solely to certain types of information or ideas or forms of expression.”<sup>473</sup>

Having established, for the first time, that Article 10 was indeed applicable in the context of commercial expression, the bulk of the remaining reasoning centred on whether the interference was necessary in a democratic society. In so doing, the Court adopted what has been described as the ‘non-substitution principle’,<sup>474</sup> under which the Court defers to, and refuses to engage with, the domestic courts' judgment. In particular, in *Markt Intern*, the Court exercised the non-substitution principle by way of the margin of appreciation, which it described as being, “essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition.”<sup>475</sup> Therefore, the Court surmised that it, “must confine its review to the question [of] whether the measures taken on the

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<sup>470</sup> *Markt Intern*, *op cit*, para. 11

<sup>471</sup> *Markt Intern*, *op cit*, para. 17

<sup>472</sup> *Markt Intern*, *op cit*, paras. 25-26

<sup>473</sup> *Markt Intern*, *op cit*, para. 26 (citing Müller, para. 27)

<sup>474</sup> *Harris et al* (n 1) at 462

<sup>475</sup> *Markt Intern*, *op cit*, para. 33 (emphasis added)

national level are justifiable *in principle* and proportionate,” and not engage in a “re-examination of the facts and...circumstances of each case.”<sup>476</sup>

As such, and with regards to the proportionality of the interference, the key requirement stipulated by the Court was, uncontroversially, that both the interests of protecting the reputation and rights of others as well as the interest of publishing the information in question be weighed.<sup>477</sup> Notwithstanding the importance of the specialised press in providing a channel of information to its clientele and in ensuring transparency in the realm of commercial and business undertakings, the Court went on to note that, “even the publication of items which are true and describe real events may under certain circumstances be prohibited.”<sup>478</sup> Thus, in this regard, privacy, confidentiality, the inclusion of value judgments or insinuations and the hasty generalisation of a state of affairs from an individual set of circumstances were all considered to be factors of relevance in the balancing exercise required in the assessment of proportionality, in the ‘commercial context’.<sup>479</sup> Such considerations are not controversial and are not unique to the commercial context. However, in line with the non-substitution principle outlined above, the Court acceded that, “it is primarily for the national courts to decide which statements are permissible and which are not.”<sup>480</sup> Accordingly, since the Court accepted that the national courts had indeed considered such factors in the weighing of the competing interests (such that the domestic court’s decision could not be said to be unjustifiable in principle) the Court was satisfied – by a remarkably slim majority, in which the casting vote was placed by the President of the Court – in finding there to have been no violation of Article 10.<sup>481</sup> Despite locating commercial expression within the parameters of Article 10, by applying a wide margin of appreciation with its accompanying demonstration of institutional deference in which the Court bound itself to a lax level of review, commercial expression was found to enjoy a relatively low *de facto* protection.

That the Court was so divided is perhaps not surprising given the relative novelty of the issues presented before it. Conversely, the extent of the division suggests that the dissenting opinions – which broadly concurred with one another – are of considerable weight, if not for their authority than for their persuasiveness. With regards to the necessity of the

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<sup>476</sup> *Markt Intern, op cit*, para. 33 (emphasis added)

<sup>477</sup> *Markt Intern, op cit*, para.34

<sup>478</sup> *Markt Intern, op cit*, para. 35

<sup>479</sup> *Markt Intern, op cit*, para. 35

<sup>480</sup> *Markt Intern, op cit*, para. 35

<sup>481</sup> *Markt Intern, op cit*, paras. 34 - 38



interference in a democratic society, the joint dissent, which included Judge Pettiti, aligned itself with Pettiti's *Barthold* opinion by criticising the majority's failure to convincingly establish the necessity of the injunction; the test being, for the dissenting judges, that of demonstrating a 'relevant and sufficient' justification for the interference and not merely that the interference was reasonable, as acceded by the Court's application of the non-substitution principle.

Furthermore, from a more theoretical perspective, the importance of commercial expression as a facet of freedom of expression more generally is stressed in the joint dissenting opinion, it being maintained that commercial expression is *equally* as important as political expression in that it can be seen to serve the general interest: that the expression at issue defended a given interest, economic or otherwise, was not considered sufficient reason to deprive it of the benefits accrued under Article 10. In this regard, freedom of expression in the commercial context was considered, in the dissent, to be an 'invaluable tool' in the protection of consumers and retailers, in addition to ensuring the openness of business activities.

Moreover, the joint dissenting opinion describes the majority's application of the margin of appreciation as "a cause for serious concern" owing to the 'considerable' restrictive effect it was seen to have on freedom of commercial expression in addition to its application precluding the Court from discharging its function of European supervision. Such a failing, in the present case at least, may well be considered as especially worrying given that, for the dissenting judges, the domestic courts had in fact failed to consider the interests of the applicant during the balancing process. Affording a wide margin of appreciation thus rendered the Court powerless to inquire in to this claim. Indeed, Judge Pettiti develops the argument further in his individual dissenting opinion, asserting that to allow a wide margin of appreciation in the area of competition law because of the areas' complexities is to offer the State the possibility of defending a specific interest: a state of affairs antithetical to the values underlying freedom of expression. Furthermore, such a position is all the more concerning given the immense economic pressure that commercial groups can yield, potentially degrading truth as well as even being harmful to public health.

Identifying the importance of commercial expression within the general freedom of expression nexus is further developed in the separate dissenting opinion of Judge Martens, as approved by Judge Macdonald. Particular attention is directed to the fundamental tension

between unfair competition legislation and freedom of expression, noting the dangers of attributing a blanket lower level of protection to commercial expression. At the procedural level, Judges Martens and Macdonald, for instance, note that the laws of unfair competition and freedom of expression are fundamentally incompatible with each other. Unfair competition laws, as Judge Martens points out, start from the assumption that competitors seek only to serve their own interests at the expense of others in the market, such that there is a presumption in favour of prohibiting criticism with the onus lying on the person making the criticism to prove that there are sufficient grounds to allow the criticism. On the other hand (and conversely) it is said that freedom of expression presumes that a given expression is made in the general interest, the result being that it is for an individual (qua the State) to adduce that the expression in question was not acceptable. Accordingly, for Judges Martens and Macdonald, the Court in a sense misdirected itself in accepting that the proper approach was simply to weigh the interests of the two ‘competitors’. Instead, the balance should have been between the general interest ensuing from the expression and the interest of the individual company. As such, according to Judges Martens and Macdonald, the Court should have started from the premise that there had been a significant defect in the reasoning of the domestic courts which would, in turn, have severely limited the applicability of the margin of appreciation, rather than limiting itself from the outset the introduction of a narrow margin of appreciation.

***Casado Coca v. Spain (1994)***<sup>482</sup>

In the case of *Casado Coca*, the applicant, a practising lawyer, was subjected to disciplinary proceedings by the Barcelona Bar Council following his placement of advertisements offering his services in several newspapers, contrary to a ban on professional advertising. The series of advertisements contained only the applicant’s name, profession, address, and telephone number.<sup>483</sup> After an unsuccessful appeal against the Bar Council’s penalties, which included two reprimands and two warnings, to the National Bar Council, the applicant sought redress through the national courts, with a similar degree of success, with the Constitutional Court rejecting as inadmissible Mr Casado Coca’s appeal. There, the court reasoned that the ban on professional advertising did not infringe the right to freedom of expression since advertising “directly or indirectly promot[es] the conclusion of contracts relating to movable or immovable property, services, rights or obligations”

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<sup>482</sup> *Casado Coca v. Spain (1994)* (HUDOC)

<sup>483</sup> *Casado Coca, op cit*, para. 36

whereas, in contrast, freedom of expression sought to guarantee citizens to “form their beliefs by weighing different or even diametrically opposed opinions and thus taking part in the discussion of public affairs.”<sup>484</sup>

Building on the disparity, as perceived by the Spanish constitutional court, between advertising and the sort of information covered by freedom of expression guarantees, the government sought, simply, to argue that Article 10 was not applicable in the present case. In particular, the government sought to argue that advertising did not fall under the ambit of Article 10, primarily on the grounds that advertising does not seek to serve the public interest but, rather, the interests of individuals through the obtaining of more clients and contracts.<sup>485</sup> Indeed, the government went so far as to assert that: “Applying the guarantees of Article 10...to advertising would be tantamount to altering the scope of that Article...”<sup>486</sup>

In light of *Markt Intern*, however, the Court was not persuaded by the Government’s contentions. In developing the position that Article 10 is indeed applicable in the context of commercial expression, the Court reasoned that Article 10 was explicitly applicable to *everyone* such that, “[n]o distinction is made [in Article 10] ... according to whether the type of aim pursued is profit-making or not.”<sup>487</sup> Moreover, the Court added that, “a difference in treatment in this sphere might fall foul of Article 14...” and its guarantees regarding non-discrimination in the application of Convention rights.<sup>488</sup>

Accordingly, the Court noted the assertion made in *Markt Intern* that freedom of expression is not limited to certain ideas and types or forms of expression before adding the further assertion, absent in *Markt Intern*, that this was especially so with regards to those expressions of a political nature.<sup>489</sup> In line with *Markt Intern*, whilst the insertion of the preference for political expression is perhaps indicative of a general unease with affording commercial expression the same degree of protection as political expression, it remains accepted that commercial expression nevertheless falls within Article 10’s parameters. That this was so with regard to the facts presented to the Court was further justified by the Court’s acknowledgment that, whilst Mr Casado Coca’s notices were, “clearly published with the aim of advertising, [...] they provided persons requiring legal assistance with

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<sup>484</sup> *Casado Coca, op cit*, para. 15

<sup>485</sup> *Casado Coca, op cit*, para. 33

<sup>486</sup> *Casado Coca, op cit*, para. 33

<sup>487</sup> *Casado Coca, op cit*, para. 35 citing *Autronic AG v. Switzerland* (1990) (HUDOC) para. 47

<sup>488</sup> *Casado Coca, op cit*, para. 35

<sup>489</sup> *Casado Coca, op cit*, para. 35 (emphasis added)

information that was of definite use and likely to facilitate their access to justice.”<sup>490</sup> Thus, since the advertisements satisfied the low threshold seemingly required for entry in to Article 10’s protective sphere, in line with the *Markt Intern* judgment, the Court was satisfied that Article 10 was indeed applicable.

Notwithstanding the low threshold required to gain entry to the benefits accrued in Article 10, the government’s plea of a large margin of appreciation in the context of commercial expression was successful, with the Court holding by a majority of five votes to two that there had been no violation of Article 10. Citing the Court’s previous assertions regarding the margin of appreciation in *Markt Intern*, the Court reasoned that the wide margin afforded to national authorities in the realm of unfair competition legislation applied, *mutatis mutandis*, to the regulation of advertising.<sup>491</sup> Thus, the Court confined itself, again, to the task of, “ascertaining whether the measures taken at [the] national level are justifiable *in principle* and *proportionate*.”<sup>492</sup>

After noting the qualifications implicitly inherent in commercial expression (with the rejoinder of the ‘close scrutiny’ of any restrictions thereafter) the Court paid close attention to the state of flux across Europe with regards to the regulation of professional advertising, especially that of lawyers, such that, at the material time, the national authorities could not have been said to have transgressed the bounds of their (considerable) margin of appreciation – the Bar Council recognised as being best placed to strike an appropriate balance between the various interests at play given their direct and continuous contact with their members.<sup>493</sup> Indeed, it was precisely this variable and organic state of flux in the area of lawyer’s advertisements that added, in the majority’s mind, to the ‘complexity’ of the issue, and as such worked to expand the national authorities’ margin of appreciation. As such, the ban on advertising (itself not being absolute) was not considered to be disproportionate and Article 10 had not been breached.

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<sup>490</sup> *Casado Coca, op cit*, para. 36

<sup>491</sup> *Casado Coca*, para. 50

<sup>492</sup> *Casado Coca*, para. 50 (emphasis added)

<sup>493</sup> *Casado Coca*, paras. 51-56

Decided in the same year as the factually similar case of *Casado Coca*, the case of *Jacubowski* concerned the applicant's circulation of press cuttings and additional comments critical of his former employer to a number of newspaper publishers and television, radio and newspaper journalists who were clients of the former employer's news agency from whom the applicant had recently been dismissed on grounds of alleged financial incompetency. In so doing, the applicant had sought to defend himself against the allegations made in a press release published by his former employer in which Mr Jacubowski's professional competence was called to question, as well as indirectly outlining his intention to establish a new news agency. Subsequently, the former employer succeeded in obtaining an injunction preventing Mr Jacubowski from re-distributing the circular under unfair competition legislation, the domestic court accepting that, whilst there was an element of providing a counter-argument to his dismissal, the primary intention had been that of 'poaching' the clients of the applicant's former employer.

In recalling the assertion made four months previously in *Casado Coca* that Article 10 applies to *everyone*, the Court went further, explicitly affirming that:

[t]he fact that, in a given case, ... freedom [of expression] is exercised other than in the discussion of matters of public interest does not deprive it of the protection of Article 10[...]<sup>495</sup>

Whilst 'non-public interest' expression is not to be considered as falling out with the scope of Article 10's protection *per se*, its protection – or perhaps more accurately, its *level* or *degree* of protection – is subject to the qualification inherent in the application of the margin of appreciation. Thus, citing *Markt Intern*, the Court went on to reassert the importance of the doctrine of the margin of appreciation in the commercial context, especially given the complex and fluctuating nature of unfair competition laws such that, once more, "[t]he Court must confine its review to the question whether the measures taken at national level are justifiable in principle and proportionate."<sup>496</sup>

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<sup>494</sup> *Jacubowski v. Germany* (1994) (HUDOC)

<sup>495</sup> *Jacubowski*, *op cit*, para. 25 (citing *Casado Coca*, *op cit*, para. 35)

<sup>496</sup> *Jacubowski*, *op cit*, para. 26

Accordingly, in light of the lax level of review considered appropriate in the present instance, the Court had little difficulty in finding there to have been no violation of Article 10. Since the domestic courts were considered to have attributed sufficient weight to the applicant's situation and interests, and since the injunction was limited in so far as it did not prohibit the applicant from criticising his former employer *per se*, the national authorities could not have been said to have acted disproportionately in pursuing the legitimate aim of protecting the rights of others.<sup>497</sup>

Once again, the majority's application of the margin of appreciation was a cause for consternation in the dissenting opinion of Judges Walsh, Macdonald, and Wildhaber. By limiting itself to a lax review under the auspices of an overreliance on the margin of appreciation the majority, according to the dissenting voices, overlooked the 'guiding light' of the principles pertaining to freedom of expression. The Court's failure to ensure that exceptions to the fundamental right be construed narrowly, in line with the principles espoused in the *Sunday Times* case (concerning a newspaper's investigation into the effects of thalidomide), coinciding with the unduly deferential stance taken by the Court with regard to the judgments of the national courts, was tantamount, according to the dissent's fears, to conceding that the principles of freedom of expression had been reduced to the exception whilst unfair competition laws become that of the norm.

With regard to the facts of *Jacubowski*, and bearing in mind its position concerning the proper application of the margin of appreciation, the dissent considered there to be nothing untoward in the applicant's expression, either in terms of its content or form. That the circular was distributed in response to criticisms of his professional capabilities, so that the applicant was seen to be protecting both his reputation as well as future prospects of pursuing similar employment, were considered by the dissenting judges to be legitimate motives that were so intertwined as to make it impossible to separate the advertising or competitive element from the 'pure' expression of opinion. Since the applicant had merely reproduced newspaper cuttings, in addition to making some minor comments, Mr Jacubowski could not be said to have acted excessively of improperly. Indeed, to suggest otherwise, as both the national courts and the Court in fact did, would seem to have the logically perverse effect of rendering unfair competition legislation with the capacity of making unlawful the distribution of lawful newspaper articles. This effect, in which the Court's acceptance of the national authorities' preponderance for the competitive element

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<sup>497</sup> *Jacubowski, op cit*, paras. 27-30

of the circumstances so as to reduce the principle of freedom of expression to the level of an exception, whilst elevating the unfair competition legislation to the level of a rule, cannot, so the dissenting judges surmise, be said to be demonstrative of a proper European supervision.

***Hertel v. Switzerland* (1998)<sup>498</sup>**

Following his research in to the effects of microwave cooking on human health, Mr Hertel's paper – in which the safety of microwaves was questioned on the grounds of an apparent link between their use and the initial stages of cancer – was published in a periodical as part of an issue devoted to the safety of microwaves. Acting on complaints from microwave producers, the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances (MHEA) successfully obtained an injunction under unfair competition legislation preventing the applicant from reiterating certain of the comments made in the publication.

In finding that the injunction amounted to a violation of Article 10 the majority were keen to distinguish *Hertel* from the previous cases of *Mark Intern* and *Jacobowski*. Notwithstanding the necessarily broad margin of appreciation in the commercial context in addition to the assertion made in *Jacobowski* itself that an expression's lacking of an element of public interest did not preclude Article 10's protection, the Court in *Hertel* sought to narrow the margin in the present case, maintaining that:

what is at stake is not a given individual's purely "commercial" statements, but his participation in a debate affecting the general interest, for example, over public health; in the instant case, it cannot be denied that such a debate existed.<sup>499</sup>

With the margin of appreciation having been calibrated accordingly, the Court went on to assert that it would 'carefully examine' the proportionality of the interference in pursuing the legitimate interest enshrined in Article 10(2) of protecting the rights of others.<sup>500</sup> As such, in balancing the conflicting interests at stake, the Court noted that the applicant had done no more than submit a scientific paper for publication in a periodical, the published form in which the article took, along with its images and headlines, being beyond the

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<sup>498</sup> *Hertel v. Switzerland* (1998) (HUDOC)

<sup>499</sup> *Hertel*, *op cit*, para. 47

<sup>500</sup> *Hertel*, *op cit*, para. 47

applicant's control. What's more, it was recognised that the content of the paper was largely written in a non-affirmative tone, so that many of the applicant's assertions were worded conditionally, such that Mr Hertel's findings merely indicated that microwave cooking 'might' correspond to the initial stages of cancerous developments before indicating that research in the area was worthy of further attention.<sup>501</sup>

Furthermore, and in-keeping with the scope attributed to the margin of appreciation in the present case, the Court was considerably more willing to 'review' the decisions of the national courts than it had previously demonstrated. In particular the Court noted that it had not been sufficiently established that the publication of Mr Hertel's paper had had any significant impact on the interests of members of the MHEA such that there was considered to be a disparity between the legitimate aim pursued and the measures taken against the applicant.<sup>502</sup> Therefore, and in light of the potentially significant punishment attached to the non-compliance of the injunction's terms, the Court was comfortable in challenging the State's view as to the necessity of the interference, leading to the finding that the injunction was disproportionate and thus incompatible with Article 10.

***VgT Verein gegen Tierfabriken v. Switzerland (2001)***<sup>503</sup>

Despite the assurances made in *Jacobowski* that a lack of public interest attributable to a given expression would not render it out with Article 10's protective sphere, the case of *VgT Verein gegen Tierfabriken v. Switzerland* would seem to indicate the contrary, in line with *Barthold* and *Hertel*. In response to a number of television commercials fronted by the meat industry, the applicant association – whose stated aim is the protection of animals, especially in the context of animal experimentation and industrial meat production – sought to broadcast its own television commercial.<sup>504</sup> The proposed commercial comprised of two scenes. Set in a forest, the first scene showed a sow building a shelter for her piglets, the overdubbed voice commenting on the sense of family pertaining to sows whilst, in stark contrast, the second scene of the minute long advertisement depicted, "a noisy hall with pigs in small pens, gnawing nervously at the iron bars," with the accompanying voice asserting that the pigs were 'pumped full of medicaments' and that

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<sup>501</sup> *Hertel*, *op cit*, para. 48

<sup>502</sup> *Hertel*, *op cit*, paras. 49-50

<sup>503</sup> *VgT Verein gegen Tierfabriken v. Switzerland (2001)* (HUDOC)

<sup>504</sup> The commercial is available (in German) on YouTube via the following link: <http://www.youtube.com/watch?v=x-NwXJ17XZ8> (last accessed on 30<sup>th</sup> November 2015)



the rearing of pigs in such circumstances was akin to the treatment of those in concentration camps. The advertisement ended with the statement, “Eat less meat, for the sake of your health, the animals and the environment.”<sup>505</sup> The request to have the advertisement aired on the only national, commercial television company in Switzerland was refused on the grounds of its ‘clear political character’ contrary to domestic legislation as well as the television company’s terms and conditions.<sup>506</sup>

The case of *VgT Verein gegen Tierfabriken v. Switzerland* is interesting as much for the strategies adopted by the parties to the dispute as for the actual decision reached by the Court. Again, at the crux of the issue was the question of how the expression in question was to be defined, categorised and calibrated in terms of the appropriate level of protection to be afforded. Given the legislative framework within which the applicant association was engaged it is perhaps not surprising that it sought to distance the advertisement from any sense of ‘politicalness’ that may have been alluded to it, arguing simply that the advertisement in question was not ‘political’.<sup>507</sup> The advertisement, according to the applicant, merely conveyed information, in particular by comparing how pigs behave in natural settings with how they are treated by humans for mass consumption. That there were possible political consequences emanating from such information was not sufficient, so the applicant argued, to label it as ‘political advertising’.<sup>508</sup> By attempting to distance the commercial from any political connotations, the applicant’s strategy does, in this regard, seem rather at odds with the intuitions and observations outlined in the preceding discussions: namely, that political expression enjoys something of a privileged position.

The conclusion reached by a unanimous, seven-member bench and, more importantly, the rationale employed in reaching it, returns us to more familiar territory. In setting out the framework within which its subsequent analysis would be based, the Court was keen – despite the applicant’s protestations to the contrary – to highlight the political nature of the expression in question. Firstly, during the initial stages of determining whether the State could even be considered *potentially* liable<sup>509</sup> the Court, answering in the affirmative, set the scene for later analysis by stating that, “In effect, *political* speech by the applicant

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<sup>505</sup> *VgT Verein gegen Tierfabriken*, see paras. 8-10

<sup>506</sup> *VgT Verein gegen Tierfabriken*, paras. 12 and 15. For the relevant domestic legislation see paras. 24-30 (in particular para. 30)

<sup>507</sup> *VgT Verein gegen Tierfabriken*, *op cit*, para. 50

<sup>508</sup> *VgT Verein gegen Tierfabriken*, *op cit*, para. 50

<sup>509</sup> There were some questions raised as to whether the responsibility of the State could be engaged owing to the fact that the television company in question was established under private law.

association was prohibited.”<sup>510</sup> Secondly, and more pertinently for present purposes, in calibrating the scope of the margin of appreciation, the Court noted that, whilst the margin of appreciation was ‘particularly essential’ in the realm of ‘commercial matters’, in the present case the expression, “fell outside the regular commercial context [of] inciting the public to purchase a particular product.”<sup>511</sup> Instead, the advertisement was considered to have portrayed, “controversial opinions pertaining to modern society in general.”<sup>512</sup> Indeed, the fact that the Swiss authorities themselves had considered the commercial’s content as being ‘political’ (and thus justifying the prohibition of its broadcast in light of the general ban on political advertisements) seems to have given the Court further impetus to affirm that the commercial sought to contribute to a debate of common public interest.<sup>513</sup> Accordingly, since the interest at stake was that of participation in a debate affecting public interest and not mere individual, commercial interests, the margin of appreciation was reduced.<sup>514</sup>

Having established a ‘reduced’ margin of appreciation, the Court paved the way for finding a violation of Article 10, announcing that it would, as was also the case in *Hertel*, “examine carefully” the proportionality of the interference.<sup>515</sup> Fundamental to the Court’s careful examination was its assessment of whether the *general* reasons for the prohibition on political advertising could be considered relevant and sufficient when applied to the *specific* facts of the present case. It was not questioned that there may well exist good reason for the prohibition of political advertisements – indeed, many member states do so to varying degrees – what was at issue, rather, was whether those reasons justified this particular prohibition. In justifying the general prohibition of political advertisements on television, the Swiss government appealed to the notions of protecting public opinion both from financially powerful groups and undue commercial influence, the promotion of equality of opportunity amongst various groups, and the independence of broadcasters.<sup>516</sup> Such justifications, when considered in light of the instant circumstances, were not considered by the Court to be relevant and sufficient. There was no indication put forward by the government that any of the justifications for the general prohibition on political advertisements could be said to apply in the present circumstances. Indeed, for the Court,

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<sup>510</sup> *VgT Verein gegen Tierfabriken, op cit*, para. 47 (emphasis added)

<sup>511</sup> *VgT Verein gegen Tierfabriken, op cit*, paras. 69-70

<sup>512</sup> *VgT Verein gegen Tierfabriken, op cit*, para. 70

<sup>513</sup> *VgT Verein gegen Tierfabriken, op cit*, para. 70

<sup>514</sup> *VgT Verein gegen Tierfabriken, op cit*, para. 71

<sup>515</sup> *VgT Verein gegen Tierfabriken, op cit*, para. 72

<sup>516</sup> *VgT Verein gegen Tierfabriken, op cit*, para. 72

“all the applicant association intended to do with its commercial was to participate in an ongoing general debate on animal protection and the rearing of animals.”<sup>517</sup> As such, this particular prohibition of a ‘political’ commercial could not be said to be necessary in a democratic society and a violation of Article 10 found.<sup>518</sup>

***Stambuk v. Germany (2002)***<sup>519</sup>

In *Stambuk* the Court once again had to consider the question of commercial expression in the context of unfair competition legislation, this time in light of the applicant’s contribution to a newspaper article on the use of laser eye surgery. The article, which was accompanied by a photograph of the applicant – an ophthalmologist specialising in the practice of laser eye surgery – referred to Dr Stambuk having treated over 400 patients with a 100 per cent success rate, the effect of which was ascertained by the national courts as going beyond the expression of merely objective information on a medical operation and was, instead, more akin to publicity, with the applicant said to have, “deliberately acted so as to give prominence to his own person.”<sup>520</sup>

Given the similarities between *Stambuk* and *Barthold* it is perhaps not surprising that the Court held, this time unanimously, that there had been a violation of Article 10. However, *Stambuk* remains important in so much as the Court further developed its position on the appropriate treatment of commercial expression within the confines of Article 10. Indeed, in setting out the general principles to be applied to the present case, the Court outlined the importance of commercial expression in general, “recall[ing] that, for the citizen, advertising is a means of discovering the characteristics of services and goods offered to him.”<sup>521</sup> Whilst acknowledging that certain circumstances may require restrictions on such speech, the Court went on to assert that, “[a]ny such restrictions must, however, be *closely scrutinised* by the Court.”<sup>522</sup> Under this ‘close scrutiny’ the Court sought to distinguish the present case from the comparable case of *Casado Coca* primarily on the grounds that, whilst there was little in the way of pan-European consensus on the regulation of professional legal activities, the same was not comparably true of the medical profession.<sup>523</sup>

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<sup>517</sup> *VgT Verein gegen Tierfabriken, op cit*, para. 75

<sup>518</sup> *VgT Verein gegen Tierfabriken, op cit*, para. 79

<sup>519</sup> *Stambuk v. Germany (2002)* (HUDOC)

<sup>520</sup> *Stambuk, op cit*, paras. 10 and 15

<sup>521</sup> *Stambuk, op cit*, para. 39

<sup>522</sup> *Stambuk, op cit*, para. 39 (emphasis added)

<sup>523</sup> *Stambuk, op cit*, para. 40

In so doing, the Court effectively paved the way for a finding of a violation of Article 10 by reducing the scope of the margin of appreciation and thus enabling itself to actively engage in an assessment of the complained of measure. Furthermore, that significance was attached to the, “essential function fulfilled by the press in a democratic society” is of interest in as much as it may prove to be indicative of the bolstering of the Court’s underlying theory of freedom of expression more generally, with specific impact on the issues surrounding the categorisation of expression. There is, as we shall see, a seemingly underlying notion in *Stambuk* – as indeed there was with *Barthold* and *Hertel* – of the Court’s consideration of the case as being concerned with public interest rather than commercial expression *per se*.

Whilst the Court acknowledged that the reasons adduced by the government in pursuing the interference with the applicant’s freedom of expression were relevant, they were deemed to be insufficient. Fundamental to the Court’s reasoning in finding there to have been a violation of Article 10 was the supposed impossibility, again, of differentiating the various elements that made up the whole of the expression in question. Again, as in *Barthold*, any publicity like effect that the article may have had was considered secondary to the underlying point of the article, which concerned, “a new laser operation technique to correct the defective vision of patients *and was thus informing the public on a matter of general medical interest.*”<sup>524</sup> Under the ‘close scrutiny’ afforded to the Court in the current case, the facts were considered such as to tip the balance of proportionality in the applicant’s favour. Accordingly a number of factors were considered – including, *inter alia*, that the article was written by a journalist, acting on her own initiative; that the article was generally written in such a way as to indicate, as its underlying purpose, the informing of the public on the specific issue of new techniques in eye surgery; that references to Dr Stambuk’s success rate were an integral part to the article – his experience being an important factor in the presentation of a new operation; similarly, the photograph of the applicant, taken in a ‘professional context’ was considered as being ‘closely related’ to the contents of the article; and, finally, the possibility of a fine – all of which, in an unanimous decision, led the Court to find that the restrictions imposed on Dr Stambuk were disproportionate with regard to pursuing the legitimate aim of protecting the rights of others.<sup>525</sup> Moreover, at a more conceptual level and echoing the dissenting opinions in *Jacobowski*, the Court was again critical of the overzealous rigour with which unfair

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<sup>524</sup> *Stambuk, op cit*, para. 46 (emphasis added)

<sup>525</sup> *Stambuk, op cit*, paras. 45-54

competition legislation was being applied in the context of the medical profession, in terms of its impact on freedom of expression.<sup>526</sup>

***Krone Verlag GmbH & Co KG v. Austria (No. 3) (2003)***<sup>527</sup>

The Court's case law, as developed from *Barthold* to *Stambuk*, would seem to indicate that, whilst coming within the parameters of Article 10, unless it can be sufficiently demonstrated that it contains a sufficient degree of 'public interest-ness', commercial expression remains subjected to a relatively lower level of protection vis-à-vis the widening of the margin of appreciation and a concomitantly lax degree of judicial scrutiny. Thus, to summarise, the expressions conveyed in *Barthold*, *Hertel*, *VgT Verein gegen Tierfabriken* and *Stambuk*, were all protected owing in large part to their capacity to contribute to a matter of public interest; whereas, conversely, in those cases in which there was deemed to be little in the way of such a contribution – such as *Markt Intern*, *Casado Coca* and *Jacobowski* – no violation of Article 10 was found. However, the case of *Krone Verlag*, decided only a year after *Stambuk*, offers something of an anomaly.

In *Krone Verlag*, the applicant company – owner of the newspaper *Neue Kronenzeitung* – published an advertisement in its newspaper, the content of which compared its subscription rates to those of another newspaper – the *Salzburger Nachrichten* – in addition to describing *Neue Kronenzeitung* as 'the best' local newspaper.<sup>528</sup> The *Salzburger Nachrichten* was subsequently successful in obtaining an injunction that stipulated, *inter alia*, that *Neue Kronenzeitung* refrain from further publication of similar advertisements comparing the prices of newspapers without also referring to the differences between those papers in terms of their respective reporting styles with regard to the coverage of domestic and foreign affairs, economics, culture, science, environmental issues and so on.

Therefore, whilst accepting that the newspapers were in competition with each other, one of the fundamental aspects of the injunction was to ensure that the *differences* between the newspapers be made sufficiently clear. Underlying this notion was the acceptance, by the national courts, that the advertisement was, in a sense misleading, in as much as the *Salzburger Nachrichten*, in contrast to the *Neue Kronenzeitung*, was considered to be a

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<sup>526</sup> *Stambuk*, *op cit*, para. 50

<sup>527</sup> *Krone Verlag GmbH & Co KG v. Austria (No. 3) (2003)* (HUDOC)

<sup>528</sup> *Krone Verlag*, *op cit*, para. 10

‘quality’ paper such that comparing the prices of the newspapers, without reference to such aspects of the newspapers’ content and style, was considered unfair.

In a unanimous decision of seven judges, the Court held that the injunction (or at least that part of the injunction complained of) violated Article 10. Noting the domestic courts’ emphasis on the differential quality of the two newspapers concerned, the Court highlighted a certain, logical contradiction in their reasoning. In particular it does seem somewhat confusing to suggest that it was misleading to compare the prices of the two newspapers on account of their incomparable quality whilst simultaneously accepting that the two newspapers were in the same market competing for the same customers.<sup>529</sup> Moreover, the Court – concerned with the potential ‘quite far-reaching consequences’ – described the injunction as being ‘far too broad’.<sup>530</sup> In particular the Court was concerned that the injunction’s ‘highly difficult’ requirements of spelling out the differences between the newspapers placed too great an onus on the applicant. This burden placed on the applicant, in light of the not inconsiderable penalty for failure to comply, led the Court to affirm that the national authorities had overstepped its margin of appreciation, despite its width in the realm of unfair competition and advertising, to the extent that it could not be said that the injunction met a pressing social need and was necessary in a democratic society.<sup>531</sup>

Given that – notwithstanding the width of the margin of appreciation in the commercial context, and the fact that the specific expression was not deemed to be contributing to a discussion of public interest – the Court still felt comfortable in engaging with the domestic courts’ decision with regards to the proportionality and necessity of the interference, *Krone Verlag* may well mark the beginnings of ‘pure’<sup>532</sup> commercial expression’s strengthened position within the Article 10 framework. Given its surrounding jurisprudence, noted above, it remains too early, however, to fully account for the extent to which *Krone Verlag* (No. 3) will impact on the Court’s approach to the categorisation and the subsequent attribution of varying levels of protection to the various types of expression in future, factually similar cases.

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<sup>529</sup> *Krone Verlag, op cit*, para. 32

<sup>530</sup> *Krone Verlag, op cit*, para. 33

<sup>531</sup> *Krone Verlag, op cit*, paras. 33-35

<sup>532</sup> i.e. Commercial expression that is lacking in capacity to contribute to a discussion of public interest.

That *Krone Verlag* (No. 3) is something of an anomaly in the European Court of Human Rights' approach to categorising and protecting the various types of expression is seemingly confirmed in the *Swiss Raelian Movement* case, though it must be born in mind that the facts differ significantly from *Krone Verlag* (No. 3). Indeed, one may question whether the *Swiss Raelian* case actually concerns commercial expression at all. Nonetheless, the Court's approach in this recent case remains instructive in aiding our understanding of its approach to categorising expression.

In seeking to conduct a localised poster campaign, the applicant association requested permission from the relevant authorities to display their poster on public billboards for a specified duration. Permission to display the poster was subsequently denied by the authorities. The Raelian Movement, of which the applicant association was a national branch, is modern in origin and premised on the doctrine espoused by its self-professed leader Claude Vorilhon (known as 'Rael' to his followers) vis-à-vis his alleged contact with extraterrestrials. Fundamental to the Raelian movement's credo is the belief that life on earth, including many of its traditional religions, was created by extraterrestrials with knowledge of 'advanced technology'.<sup>534</sup>

The poster in question was, in and of itself, neither unlawful nor gratuitously or provocatively offensive.<sup>535</sup> Its text simply stated, 'The Message from Extraterrestrials' and 'Science at last replaces religion' in addition to including the website address and phone number of the organisation. Accompanying the text were the equally innocuous pictures of extraterrestrials, a pyramid and a flying saucer.<sup>536</sup> Despite the seemingly placid, albeit alternative, nature of the poster the domestic courts were consistent in upholding the prohibition on the primary grounds of respect for morals and public (and/or legal) order. In particular, the domestic courts' reasons for upholding the prohibition were threefold. Firstly, it had been observed that the website to which the poster intended to direct people to itself contained a link to Clonaid's website, a company said to offer 'cloning-related services to the general public,' a practice made illegal by Swiss law<sup>537</sup>; second, was the

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<sup>533</sup> *Swiss Raelian Movement v. Switzerland* (2012) (HUDOC)

<sup>534</sup> *Swiss Raelian Movement*, *op cit*, paras. 10-11

<sup>535</sup> See, for example, the Federal Court's position, cited at *Swiss Raelian Movement*, *op cit*, para. 21

<sup>536</sup> *Swiss Raelian Movement*, *op cit*, para. 14

<sup>537</sup> *Swiss Raelian Movement*, *op cit*, para. 21

question of possible sexual abuse of children owing to the fact that ‘numerous’ members of the association had been investigated in this regard and; thirdly, the association’s promotion of geniocracy – a political philosophy under which it is maintained that power ought to rest only in the hands of those citizens whose mental capacities demonstrate above average IQ – was said to be ‘likely to undermine the maintaining of public order, safety and morality’.<sup>538</sup> It is interesting to note, therefore, that the case brought before the European Court of Human Rights, whilst under the auspices of Article 10, did not actually concern the specific expression in question: that of pictures of aliens and predominantly inoffensive text. More interesting still, however, is the approach taken by the Court itself in affirming that there had been no violation of Article 10, one in which the categorisation of expression can be seen as having profound effects.

In setting the field with regards to its assessment of the necessity of the interference in question, the Court noted, once more, that the margin of appreciation is variable, its width in any given case being dependant on various factors, though, of ‘particular importance’, is the *type* of speech concerned.<sup>539</sup> In this regard it was noticed by the Court that, “Whilst there is little scope under Article 10(2) of the Convention for restrictions on political speech...a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion...Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising.”<sup>540</sup>

Given that the type of expression in question is of ‘particular importance’ in determining the requisite scope of the margin of appreciation, an examination of the conditions considered relevant in leading the Court in its determination of the classification of a given expression *in concreto* is crucial. In summary, the Court deduced that the expression in question, whilst neither political nor commercial *per se*, nevertheless was ‘closer’ to commercial expression than its political counterpart. A number of factors led a slim majority of the Court to reach this conclusion, with the concomitant result being that the margin of appreciation was duly widened. The Court’s reasoning, contained in a single paragraph, runs as follows:

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<sup>538</sup> *Swiss Raelian Movement, op cit*, para. 21

<sup>539</sup> *Swiss Raelian Movement, op cit*, para. 61

<sup>540</sup> *Swiss Raelian Movement, op cit*, para. 61 (citations omitted)



Since the poster's primary function was to draw people's attention to the ideas and activities of the organisation, the website *therefore* 'refers only incidentally to social or political ideas.'<sup>541</sup>

Moreover, the Court asserted that the expression could not be considered 'political' because, "the main aim of the website...is to draw people to the cause of the applicant association and not to address matters of political debate..."<sup>542</sup>

Conversely, the expression could not be said to be purely commercial on the grounds that, "there [was] no inducement to buy a particular product."<sup>543</sup> Nevertheless, the expression was considered to remain closer to commercial expression owing to its 'certain proselytising function'.<sup>544</sup>

With the margin of appreciation widened, the Court surmised that, "only serious reasons could lead it to substitute its own assessment for that of the national authorities."<sup>545</sup> In this regard, the Court distinguished the present case from that of *Tuzel*<sup>546</sup> in which the prohibition of a (political) poster campaign was considered to be a breach of Article 10 primarily on account of the lack of strict judicial scrutiny at the domestic level.<sup>547</sup> The same could not be said, according to the Court, in the present case: detailed reasons were given by the local authorities, with the lower courts' reasoning with regards to the three principle justifications having been sufficiently examined by the Federal Court which, in addition was also deemed to have considered, to a sufficient level, Article 10 considerations.<sup>548</sup> Thus, by defining and categorising the expression in such a way as to diminish any notion of the expression's capacity to contribute to a discussion of public interest, and by locating the particular expression within close proximity to commercial expression and its generally wider margin of appreciation, the majority of the Court concluded that there had been no violation of Article 10.

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<sup>541</sup> *Swiss Raelian Movement, op cit*, para. 62

<sup>542</sup> *Swiss Raelian Movement, op cit*, para. 62

<sup>543</sup> *Swiss Raelian Movement, op cit*, para. 62

<sup>544</sup> *Swiss Raelian Movement, op cit*, para. 62

<sup>545</sup> *Swiss Raelian Movement, op cit*, para. 66

<sup>546</sup> *Tuzel v. Turkey (No. 2) (2006) (HUDOC)*

<sup>547</sup> *Swiss Raelian Movement, op cit*, para. 67

<sup>548</sup> *Swiss Raelian Movement, op cit*, see paras. 67, 70 and 71

### 3.4.6 Overview of the case law analysis

Divining a lucent rationale from the Court's case law with regards to the issue of categorising expression is an inherently fraught task, made all the more difficult because of the non-differentiated exposition of the right to freedom of expression contained within the text of Article 10. Nonetheless, the underlying and commonly held assumption – born out in the overview of the case law provided above – is that, whilst what constitutes 'expression' for the purposes of Article 10(1) is construed quite broadly, incorporating a wide range of expression within the *coverage* of Article 10, a hierarchy has emerged from the application of Article 10(2) so as to afford differing levels of *de facto protection* (essentially by widening or narrowing the so-called margin of appreciation doctrine) of the different types of expression. In applying Schauer's proposition that definition be parasitic on justification in conjunction with Sunstein's thesis that expression's protection be subject to the proximity with which it is considered to lie with Article 10's underlying values, the preceding discussion of the prominent case law concerning the categorisation of expression would appear to indicate the recognition of the primacy of political expression and contribution to public discourse. As such, in defining the value of expression for the purposes of Article 10, significance is placed on the expression's capacity to contribute to public discourse on matters of a broadly 'political' nature.

In light of the case law analysis above, the variability of protection afforded to the different categories of expression is intricately related to the variability of the margin of appreciation and the concomitant variability of the degree of scrutiny with which the European Court of Human Rights will engage in its assessment of the necessity and proportionality of a given interference with a covered category of expression. Indeed, that the Court's categorisation of a given expression as being political, artistic or commercial is of fundamental import is appreciated by Harris et al. who affirm that: "The nature of speech is crucial for assessing the Court's standard of review."<sup>549</sup> In this connection, it will be remembered that the right to freedom of expression under Article 10 is a qualified right; that is to say that, in accordance with the limitation clauses of Article 10(2), the State may lawfully restrict an individual's right to freedom of expression.

Accordingly, the lawful restriction of the right to freedom of expression requires, under Article 10, that the restriction be prescribed by law and is necessary in a democratic society

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<sup>549</sup> Harris *et al* (n 1) at 455

in the interest, *inter alia*, of national security, protection of morals and the protection of the rights of others thus enabling the subsequent variability of protection afforded to expression by the jurisprudence of the European Court of Human Rights within Schauer's 'protection' rubric and the proximity argument advanced by Sunstein. In determining whether a given State interference with freedom of expression *is* in fact necessary in a democratic society and proportionate in achieving a specific interest, the standards of review and the entailing rigour with which the Court will engage in its reasoning is intimately grounded in, and dependent upon, the Court's application of the margin of appreciation principle. Indeed, it is the very variability of the margin of appreciation – designed by the European Court of Human Rights to defer to the judgment of national authorities – which, when applied to freedom of expression, may to a certain extent, account for the variability with which the different categories of expression are protected and the creation of a *de facto* hierarchy of expression.

As the case law analysis above sought to establish, at the apex of the European Court of Human Rights' protection of covered expression lies political/public interest expression. However, it was not until 1999 and the case of *Ceylan v. Turkey*<sup>550</sup> that the Grand Chamber of the European Court of Human Rights confirmed the normative methodology (and indeed phraseology) – developed through the lower courts since at least the mid-1980s – by which the high level of protection afforded to political expression and, conversely, the relatively low degree of protection afforded to artistic and commercial expression was explicated.<sup>551</sup> Thus, it will be remembered that in the case of *Ceylan* the Grand Chamber affirmed that: "there is little scope under Article 10 paragraph 2 of the Convention for restrictions on political speech or on debate of matters of public interest,"<sup>552</sup> thereby working to reduce the margin of appreciation available to State authorities in limiting such expression.

In narrowing the State's margin of appreciation *vis* the mantra of there being 'little scope' for restrictions on political expression and debate on matters of public interest the Grand Chamber directly cited the terminology employed in the case of *Wingrove v. UK*<sup>553</sup> which, in turn, developed the articulation of the 'little scope' mantra from the underlying positions implicit in its early judgments of, *inter alia*, *Lingens* and *Thorgeirson*. That the 'little scope'

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<sup>550</sup> *Ceylan v. Turkey* (1999) (HUDOC)

<sup>551</sup> See, for instance, *Lingens v. Austria*, para. 42 and for the phrase's use in the context of artistic expression see *Wingrove v. UK*, para. 58

<sup>552</sup> *Ceylan v. Turkey*, *op cit*, para. 34; *Surek v. Turkey (No. 1)* (1999) (HUDOC), para. 61

<sup>553</sup> Given its relevance to the freedom of artistic expression, the case of *Wingrove v. UK* will be discussed in greater detail in Chapter Four.

mantra enounced in *Wingrove* and confirmed in *Ceylan* emerged from these cases is therefore somewhat indicative of an application of the theses provided in the works of Blocher, Schauer and Sunstein according to which the perceived values underpinning Article 10 are of significant import for the subsequent level of protection afforded to a given category of expression. Thus, the European Court of Human Rights' recognition that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention," in *Lingens*, in conjunction with the "[r]egard must...be had to the preeminent role of the press in a State governed by the rule of law"<sup>554</sup> enounced in *Thorgeirson* were of fundamental significance in the narrowing of the State's margin of appreciation, thereby affording the European Court of Human Rights greater scope for actively engaging in an assessment of the proportionality and necessity of the interference in question.

Accordingly, whilst it is accepted that political expression is not immune entirely from State interference, the general tenor of the Court's reasoning from *Lingens* to *Ceylan* can be seen as requiring particularly strong grounds for State interference in the expression of what may be considered as broadly political. To paraphrase a synthesis of the theses of Schauer and Sunstein, with the close proximity of political expression to the perceived underlying purpose of Article 10, particularly onerous justification for its restriction is required under the contraction of the margin of appreciation.

As such, the 'little scope...for restrictions on political speech' mantra based, in turn, on the proximity with which such expression is considered to advance the values underpinning Article 10's freedom of expression, may be considered as providing a benchmark against which one can measure the scope of the margin of appreciation to be applied to the various forms of expression and the concordant degree of scrutiny with which the European Court of Human Rights will assess a given interference with the right to freedom of expression. Thus, in the context of commercial expression, the analysis provided above suggests that the extent to which the expression is perceived to have the capacity of contributing to public discourse is crucial in the determination of the width of the margin of appreciation and subsequent *de facto* protection.

The variability of the margin of appreciation is, as such, most clearly seen in the development of the European Court of Human Rights' jurisprudence concerning

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<sup>554</sup> *Thorgeir Thorgeirson*, *op cit*, para. 63

commercial expression, according to which the extent to which the expression contributes to public discourse plays a crucial determinative factor. For instance, the rationale employed by the European Court of Human Rights in the case of *Markt Intern* which, despite its conceptual novelty at the time, remains a defining case, stipulated that a wide margin of appreciation was “*essential* in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition.”<sup>555</sup> The wide margin of appreciation available to States on questions of what might be described as ‘pure’ commercial expression may be contrasted with commercial expression that contains a sufficient public interest-ness. Thus, the margin of appreciation was narrowed in such cases as *Barthold* (newspaper article referring to the applicant’s veterinary surgery), *Hertel* (research on the effects of microwave ovens), *VgT Verein gegen Tierfabriken* (television commercial concerning animal rights) and *Stambuk* (doctor’s contribution to a newspaper article on laser eye surgery) in large part because the public interest aspects in each instance were seen to override the expression’s purely advertising or commercial aspects.

Therefore, in advancing a differentiated scale of protection to the varying categories of expression, vis-à-vis the expansion and contraction of the margin of appreciation, the Court may be seen to have, in general terms, established the framework with which to put Schauer’s coverage-protection distinction in to practice: the width of the margin of appreciation being intricately linked with the extent to which the expression is regarded as advancing the underlying values of Article 10. The impact with which the variability of the margin of appreciation may be seen to have on the *de facto* variability in the protection of different categories of expression will next be considered with reference to the variability of the European Court of Human Rights’ scrutiny of a given interference with an individual’s right to freedom of expression.

Corresponding with the variable margin of appreciation said to be enjoyed by State authorities in the limitation of the various types of freedom of expression is the extent with which the European Court of Human Rights feels comfortable in engaging with and examining the justifications for limiting Article 10 rights as proffered by the State. Thus, with the margin of appreciation narrowed in instances concerning political expression, the Court has stressed that there is a requirement of ‘the closest scrutiny’ on its part.<sup>556</sup> The

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<sup>555</sup> *Markt Intern*, *op cit*, para. 33 (emphasis added)

<sup>556</sup> For further examples, *Castells*, *op cit*, para. 42; *Piermont v. France* (1995) (HUDOC) para. 76

‘close scrutiny’ with which the Court is seen to engage in the context of political expression is evidenced, as we have seen above, in the case of *Ceylan*.

Thus, having noted the political nature of the expression with reference to the subject matter and specific terms employed by the applicant in his writing and having calibrated the margin of appreciation accordingly, in finding there to have been a violation of Article 10 in *Ceylan* the degree of vigour with which the European Court of Human Rights engaged in its assessment of the State’s interference is considerable. In this regard, despite the ‘virulent’ and ‘acerbic’ tone of the article with its reference to, *inter alia*, ‘bloody massacres’, ‘State terrorism’ and ‘genocide’ as well as the potential for the margin of appreciation to be widened in instances concerning the incitation of violence, the majority’s judgment may be seen as ‘reading in’ an interpretation, or proffering an evaluation of, the expression in question, so as to align it with the notion that the applicant was contributing to a political debate of public interest. Indeed, the majority stipulated that the applicant’s use of ‘words with Marxist connotations’ may be considered as an attempt to explain then recent upsurges of violence in Turkey before summarising the thrust of Mr Ceylan’s argument as imploring the Kurdish movement to join, “a general struggle for freedom and democracy [...]”<sup>557</sup>

Accordingly, with the majority of the Grand Chamber reasoning that the expression fell on the side of acceptable political critique rather than a call for violence, one begins to sense a degree of circularity. By first classifying the expression as political on the basis of the speaker’s status (in this instance, a trade union leader) and the specific terms used in the article, a narrow margin of appreciation is assumed. With the narrowed margin of appreciation comes the dual effect of both limiting State discretion and increasing the scrutiny with which the Court feels comfortable in engaging with possible interpretations of and, indeed, intentions behind, the expression in question leading, in turn, to the acceptance that the expression was a genuine contribution to a political debate and not a call to violence so as to find protection within the implicit values of Article 10.

The contrast in the variability with which the European Court of Human Rights is willing to engage with its assessment of the necessity of an interference depending on the category of expression at hand is again brought in to sharp relief by the Court’s jurisprudence concerning commercial expression. Thus, the wide margin of appreciation afforded to the

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<sup>557</sup> *Ceylan, op cit*, para. 33

State with regards to the ‘pure’ commercial expression contained in *Markt Intern* – in which no violation of Article 10 was found – led the Court to surmise that it, “must confine its review to the question [of] whether the measures taken on the national level were justifiable *in principle* and proportionate,” whilst ensuring that it did not engage in a, “re-examination of the facts and...circumstances of the case.”<sup>558</sup> Clearly, the Court in *Markt Intern* did not feel as confident as it had in *Ceylan* in addressing and engaging with the facts of the case: after all, in *Ceylan*, the Court went so far as to, in effect, overrule the national courts’ finding that the applicant’s expression had incited people to hatred or hostility.

Indeed, by way of contrast, Harris et al. refer to *Markt Intern* as a prime example the Court’s application of what they call the ‘non-substitution’ principle which, as its name suggests, compels the Court to refrain from interfering with domestic decision.<sup>559</sup> Thus, notwithstanding the recognition that the specialised press promoted transparency in the business sector, because of the relatively wide margin of appreciation in instances concerning commercial expression the Court was paralysed from as full an assessment of the facts as had been the case in, for instance, *Ceylan*. Indeed, such was the extent of this self-imposed paralysis that the majority in *Markt Intern* was, according to the joint dissenting opinion of Judges Martens and Macdonald, failed to appreciate the broader, underlying issues of the case including, primarily the necessary tension between freedom of expression and unfair competition. The result of *Markt Intern* therefore would seem to suggest, to all intents and purposes, a commercial expression-sized blind spot within the Article 10 paradigm.

That the width of the margin of appreciation is seen to affect the level of scrutiny afforded to expression is further demonstrated by the jurisprudence emanating from the hybrid cases within the commercial expression paradigm such as *Barthold*, *Hertel*, *VgT Verein gegen Tierfabriken*, *Stambuck* and *Swiss Raelian Movement*. Accordingly, in the case of *VgT Verein gegen Tierfabriken* the restrictions on expression: “must...be construed strictly, and the need for any restrictions must be established convincingly, particularly where the nature of the speech is political rather than commercial.”<sup>560</sup> Despite the *prima facie* commercialesque connotations of the applicant association’s advertisement, by determining the expression to be closer in essence to political expression, the margin of

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<sup>558</sup> *Markt Intern*, *op cit*, para. 33 (emphasis added)

<sup>559</sup> Harris *et al* (n 1) at 462

<sup>560</sup> *VgT Verein gegen Tierfabriken*, *op cit*, para. 66

appreciation was widened, thus prompting a close judicial analysis of the expression's restriction. A similar process can be seen in the rationale employed by the European Court of Human Rights in *Swiss Raelian Movement*. In setting the field with regards to its assessment of the necessity of the interference in question, the Court noted, once more, that the margin of appreciation is variable, its width in any given case being dependant on various factors, though, of 'particular importance', is the *type* of speech concerned.<sup>561</sup> In this regard the Court proffered a synthesis of the *Ceylan/Wingrove/Markt Intern* jurisprudence, noting that:

Whilst there is little scope under Article 10(2) of the Convention for restrictions on political speech...a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion...Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising.<sup>562</sup>

Given that the type of expression in question is of 'particular importance' in determining the requisite scope of the margin of appreciation, an examination of the conditions considered relevant in leading the Court in its determination of the classification of a given expression *in concreto* is crucial. In summary, the Court deduced that the expression in question, whilst neither political nor commercial *per se*, nevertheless was 'closer' to commercial expression than its political counterpart. A number of factors led the slim majority of the Court to reach this conclusion, with the concomitant result being that the margin of appreciation was duly widened. With the margin of appreciation widened, and in line with the preceding discussion, the Court surmised that, "only serious reasons could lead it to substitute its own assessment for that of the national authorities."<sup>563</sup> Thus, by defining and categorising the expression in such a way as to diminish any notion of the expression's capacity to contribute to a discussion of public interest, and by locating the particular expression within close proximity to commercial expression and its generally wider margin of appreciation, so as to render the Court unable to more comprehensively engage in a thorough and critical assessment of the underlying freedom of expression issues arising from the circumstances of the case the majority of the Court concluded that there had been no violation of Article 10.

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<sup>561</sup> *Swiss Raelian Movement, op cit*, para. 61

<sup>562</sup> *Swiss Raelian Movement, op cit*, para. 61 (citations omitted)

<sup>563</sup> *Swiss Raelian Movement, op cit*, para. 66



### **3.5 CONCLUSIONS**

It will be clear, by now, that the European Court of Human Rights' methodology in terms of the categorisation of expression is not reminiscent of an exact science. However, echoes of Schauer's thesis concerning the importance of recognising the distinction between *coverage* and *protection* can be heard in the Court's practice. Accordingly, the Court's attribution of differing levels of protection to the various forms of expression – and the supposed creation of a hierarchy of expression – is not of doctrinal concern in and of itself. A differentiation in treatment may, as such, be justified, despite the non-differentiated text of Article 10, provided that this differentiation is rooted in the *value/s* considered to be enshrined in the right: definition is, as Schauer noted, parasitic on justification. Thus, instead of the existence of a binary scenario, in which expression is either protected or not-protected, a sliding scale is in operation allowing for the variable protection of covered expression with reference to the proximity of a given expression to the underlying values of Article 10.

To emphasise the point more abstractly, let us suppose that Article 10's freedom of expression is said to encapsulate value 'y'. A given expression, let's say 'expression correlating to y minus 1', will therefore be afforded greater protection than 'expression correlating to y minus 5' which in turn will be afforded substantially more protection than 'expression correlating to y minus 25.' In short, the more remote the expression in question is seen to align with the inherent values pertaining to the right of freedom of expression, the less protection that will be afforded by the Court vis-à-vis the widening of the margin of appreciation and correlating limited judicial scrutiny of the necessity and proportionality of the interference.

With reference to the hybrid expression cases, therefore, the underlying presumption held by the European Court of Human Rights is that the value imbued in the freedom of expression guaranteed under the auspices of Article 10 relates, most prominently, to the information and ideas pertaining to public discourse of a political or public interest nature. Thus, in the *Swiss Raelian Movement* case, by surmising that the expression, made in the form of a poster, was closer to commercial expression, a wider margin of appreciation was applied and, in turn, proffered in a relatively lower degree of judicial scrutiny as to the necessity and proportionality of the States interference with the expression.

The implications of the Court's application of the coverage-protection distinction for artistic expression are therefore significant though nuanced. As we have seen in Chapter Two, artistic expression does have the capacity to communicate (whether emotions *simpliciter* or knowledge of a more cognitive nature) such that Article 10's reference to the communication of 'ideas' and 'information' appears, in the abstract, to be applicable.

Indeed, as we have seen above, this general hypothesis has been accepted by the Court, in its recognition, since the case of *Müller*, that artistic expression does fall within Article 10's *coverage*. Nonetheless, there has been little attempt made by the Court to establish precisely *why* artistic expression, as a distinctive category of expression, does in fact fall within Article 10's scope. Moreover, in calibrating the scope of the margin of appreciation in any given case, it is not the form in which the expression is made *per se* that is determinative; the Court does not, for instance maintain that a wide margin of appreciation is applicable in instances concerning artistic expression. Rather, the width of the margin of appreciation is calibrated with reference to factors such as the subject-matter and the manner in which that subject-matter is expressed. Thus, artistic expression may be seen to subjected to an implicit widening of the margin of appreciation owing to the subjects commonly addressed in art (such as religion and morality) and the distinct way in which art conveys that expression.

Having established the European Court of Human Rights' doctrine concerning the categorising of expression, set against the backdrop of locating artistic expression within the freedom of expression paradigm, the stage is now set for a more thorough assessment of the Court's treatment of specifically artistic expression under Article 10.

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## **CHAPTER FOUR**

### **ART, ARTICLE 10 AND THE EUROPEAN COURT OF HUMAN RIGHTS**

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#### **4.1 INTRODUCTION**

Having outlined the issues surrounding the question of categorising expression from both a theoretical and practical perspective in Chapter Three – noting, in particular, that under the European Court of Human Rights’ jurisprudence the proximity with which expression is seen to correlate to expression of a political or public interest nature will profoundly affect the level of protection afforded – the discussion in Chapter Four centres on the specific treatment of art and artistic expression under Article 10. After a brief overview of the drafting process which culminated in the text of Article 10, with which all subsequent case law has developed, the remainder of the chapter will focus on an assessment of that jurisprudence in light of the opportunities missed within the drafting process. The examination of the prevailing case law will be assessed, predominantly, in line with the limitation clauses relied on by the State parties to the case: namely, on the grounds of protecting the rights of others – which is further subdivided in to cases concerning public morality/religion and defamation – as well as the protecting of national security, national integrity and the prevention of crime and disorder. Whilst it will emerge that artistic expression has, over time, found increasing favour in the Court (at least superficially) the particular reasoning employed by the majorities *en route* is certainly not without potential criticism.

#### **4.2 DRAFTING ARTICLE 10: AN OPPORTUNITY MISSED?**

It will be recalled that the text of Article 10 makes no explicit reference to art or, indeed, to any of the various, specific categories capable of falling within the holistic term of ‘expression’ and its reference to the right’s inclusion of the communication of ‘ideas and information’. Moreover, as we saw in Chapter Three it is this very absence that, when coupled with Schauer’s maxim that all that is covered need not necessarily be protected,

has acted as the basis from which the European Court of Human Rights has established an, albeit largely implicit and nuanced, hierarchy of expression via its application of the doctrine of the margin of appreciation. Yet, before turning to a closer examination of the specific treatment of the artistic endeavour under the Court's jurisprudence a brief account of the drafting process that culminated in the wording of Article 10 as we know it today is instructive in aiding our appreciation, from a contextual and historical perspective, of the subsequent decades of arguably unsatisfactory case law pertaining to artistic expression.

As the historian Robert Cowley surmised in his introduction to a collection of essays musing over historical 'what ifs', there commonly exists in peoples' minds, "the impression that history is inevitable [and] that what happened could not have happened any other way."<sup>564</sup> That Article 10 transpired in the precise way that it did was, likewise, not inevitable. Indeed, as the narrative concerning Article 10's drafting process will demonstrate below, for much of the drafting process art *was* incorporated in to the text of what would become Article 10. Whilst the explicit incorporation of artistic expression within the rubric of Article 10 would not – on account of the coverage-protection distinction made by Schauer – *necessarily* have provided for its greater protection, its inclusion may nevertheless, it is suggested, have gone some way to solidify the relationship between artistic expression and freedom of expression more generally so as to prompt a more secure degree of protection.

Article 10(1), in its final form, defines the right to freedom of expression simply as, "includ[ing] [the] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." Only tacitly (and somewhat narrowly) does the Article's text refer to specific media through which 'expression' may be made: namely with the reference to the State's continued ability to enforce licensing requirements pertaining to broadcasting, television and cinema activities. However, perhaps somewhat surprisingly, during much of the Council of Europe's negotiations concerning the creation of the European Convention on Human Rights between 1949 and 1950 and the ensuing drafts produced therein, the notion of freedom of expression *was* elaborated on before being removed, without fanfare, at one of the final meetings. As has been suggested above and will be further developed below, the removal of what was in fact only a handful of words from the final text of Article 10 may be

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<sup>564</sup> Cowley, R. (ed) *More What If?*, Macmillan Publishing, p. xv

considered as a root cause of artistic expression's relatively low level of protection within the European Court of Human Rights' Article 10 jurisprudence.

#### **4.2.1 From the communication of opinion by word of mouth to the communication of ideas and information: the rise and fall of art's incorporation within the rubric of Article 10**

##### **August 1949**

In response to the initial suggestion, as put before the Council of Europe's Committee on Legal and Administrative Questions by the French representative Mr Teitgen, that freedom of expression be construed as, "[t]he right not to be molested on account of [one's] opinions and the freedom to express them by word of mouth and through the press"<sup>565</sup>, the Belgian representative proposed that the text be altered so as to expressly stipulate that the right to freedom of thought and expression be construed "in accordance with Article 19 of the Declaration of the United Nations."<sup>566</sup> The Belgian's amendment was subsequently adopted, without dissent, and inserted in to the draft text of September 1949 of what would become Article 10.

As such, the text of Article 10 began its gestation period, vis-à-vis Article 19 of the UN Declaration on Human Rights, so as to include the "freedom to hold opinions without interference and to seek, receive and impart information and ideas *through any media* and regardless of frontiers."<sup>567</sup> This definition, with its explicitly open-ended reference to being applicable with regards to *any* media, was left substantively unchanged by the time the Committee of Experts had prepared the preliminary draft of the Convention at its first meeting, some six months later, in February 1950.<sup>568</sup> Indeed, there appears to have been no remarks made concerning the text of the draft article in the accompanying report of the Committee of Experts whatsoever.<sup>569</sup>

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<sup>565</sup> Article 10 Travaux, p. 2

<sup>566</sup> Article 10 Travaux, p. 3

<sup>567</sup> UN Declaration on Human Rights, Article 19 (emphasis added)

<sup>568</sup> Article 10 Travaux, p. 10. Though it should be noted that rather than simply referring to the right to freedom of expression "in accordance with Article 19 of the UN Declaration", the draft Convention articulated, almost verbatim, the right as elicited in Article 19 itself.

<sup>569</sup> Article 10 Travaux, p. 10

### **March 1950**

During the second meeting of the Committee of Experts the following month, it was suggested, at the behest of the United Kingdom's government, that the phrase "through any media" be replaced and expanded upon, such that freedom of expression would be said to apply, "either orally, in writing or in print, *in the form of art* or by duly licensed visual or auditory devices."<sup>570</sup> Thus, faced with two drafts – the first, with regard to outlining the scope of the freedom of expression resembling Article 19 of the UN Declaration on Human Rights and the second explicitly setting out the scope of the right to include, *inter alia*, artistic expression – the Committee of Experts ceded responsibility to the Conference of Senior Officials, held in June 1950, to decide on how best to proceed.

### **June 1950**

Whilst the general outcome of the June conference was an amalgamation of the two drafts, on the question of the precise explication of the scope of freedom of expression the proposal submitted by the UK government held sway. Thus, in the draft text of Article 10 submitted to the Committee of Governmental Experts for deliberation by the Committee of Ministers in August 1950, freedom of expression was expressly said to apply to the 'form of art'.<sup>571</sup> However, in a matter of days, by the time the draft text had returned to the Committee of Experts for final deliberation the words, "either orally, in writing or in print, in the form of art or by duly licensed visual or auditory devices" had been removed, leaving the text to resemble the final version of Article 10 that we know today, with no reference to art nor, indeed, the explicit, albeit open-ended, terminology of *any* media.

### **August 1950**

The travaux of the drafting process that culminated in Article 10 provides no indication as to why, at the eleventh hour, the text was so abruptly altered by the Committee of Governmental Experts. Frustratingly, any opportunity that may have arisen to ascertain or query the reasoning or justification behind the text's alteration during the Consultative

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<sup>570</sup> Article 10 Travaux, p. 10 (emphasis added)

<sup>571</sup> Article 10 Travaux, p. 15

Assembly's final debates at the end of August 1950 on the Convention was not taken, the report on the travaux noting that Article 10 "received no particular mention."<sup>572</sup>

#### **4.2.2 The relevance of Article 10's drafting process to the question of categorising expression**

Whilst the rationale underpinning the Council of Europe's deletion of artistic expression from the rubric of Article 10 remains unclear it is certainly conceivable to suppose that the chosen explication of the right in the simple terms of communicating ideas and information may have been intended, in its generality, to afford greater scope and flexibility to the right of 'freedom of expression'. However, as has been demonstrated in Chapter Three, the European Court of Human Rights' jurisprudence concerning the categorisation of expression is indicative of a hierarchy of expression based on the proximity with which a given category of expression is seen to fall within the underlying values of Article 10.

As such, as best evinced by the hybrid commercial expression cases,<sup>573</sup> the closer to political expression the expression in question is perceived to be, the greater *de facto* protection it is likely to receive in light of the narrowing of the margin of appreciation and subsequent greater judicial scrutiny of the alleged interference that such narrowing entails. The absence of an unambiguous reference to artistic expression within the framework of Article 10 may therefore be considered as an underlying cause of the precarious positioning of artistic expression within the jurisprudence of the European Court of Human Rights, leaving artistic expression – because of its distinctive relationship with freedom of expression doctrine more generally – sitting uneasily within the Article 10 jurisprudence in particular.

Such a claim may be regarded as spurious. After all, if one accepts Schauer's persuasive thesis that it is necessary, both doctrinally and practically, to appreciate the distinction between the coverage and protection of the right to freedom of expression then it follows that a simple textual reference to artistic expression within Article 10 would do little to guarantee a given artistic work's protection *per se*. Artistic expression could, even under such circumstances, quite legitimately be said to be covered whilst simultaneously, in any

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<sup>572</sup> Article 10 Travaux, p. 18

<sup>573</sup> See, for instance, the discussion pertaining to *Swiss Raelian Movement v. Switzerland* in Chapter Three

given instance, remain unprotected. Furthermore, the absence of artistic expression from the text of Article 10 may be regarded by some as an irrelevance on account of the fact that the Court has, since at least the late 1980s,<sup>574</sup> willingly accepted that artistic expression does indeed fall within the ambit of Article 10 notwithstanding its absence from the Article's rubric. Accordingly, it may well be reasonably argued that the net result – the relatively low level of protection afforded to artistic expression – could be justifiably reached irrespective of artistic expression's inclusion within the text of Article 10 on the basis that there is no necessary correlation between coverage and protection.

Yet, despite this seemingly logical conclusion there remains the question of precisely *how* artistic expression has come to be afforded a differing, and generally lower, level of protection than other forms of expression. To say that there is no necessary link between coverage and protection is not, it is suggested, to say that attributing a lower level of protection to certain types of expression is automatically justified. Moreover, without a specific point of reference in the rubric of Article 10 with which to guide the Court, the development of case law concerning artistic expression has been somewhat inconsistent and undermined by the pull of more traditional political/public interest expression.<sup>575</sup>

By closely critiquing the Court's case law concerning the specific question of artistic expression the remainder of this chapter will seek to demonstrate the general lack of doctrinal oversight in the treatment of artistic expression at the hands of the Court that leaves artistic expression, almost by default, at a disadvantage when it comes to judicial recognition. That there is little in the way of close judicial reasoning behind (or sometimes even awareness of) the relatively low, *de facto*, level of protection afforded to artistic expression leads one to ponder the question of whether an opportunity was missed in the execution of the text of Article 10.

### **4.3 ART, ARTISTIC EXPRESSION AND ARTICLE 10: A CRITIQUE OF THE EUROPEAN COURT OF HUMAN RIGHTS' ARTISTIC EXPRESSION CASE LAW**

#### **4.3.1 Establishing the framework from which to assess the European Court of Human Rights' artistic expression case law**

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<sup>574</sup> *Müller v. Switzerland* (1988) (HUDOC)

<sup>575</sup> Kearns (n 16) at 162



The stage has now been set from which to critique the European Court of Human Rights' jurisprudence concerning the freedom of artistic expression under Article 10 of the European Convention on Human Rights. The overview of theoretical considerations relating to freedom of expression and the philosophy of art contained within the opening two chapters may be regarded as something of a prelude in which it was confirmed that artistic expression may indeed be regarded as expression for the purposes of Article 10. Establishing that artistic expression has the capacity – in a conceptual sense at least – to convey 'ideas' and 'information' was important in order to bring artistic expression squarely within the confines of Article 10.<sup>576</sup> In the parlance of Schauer, then, it is suggested that there is a sufficient theoretical basis to validate the assumption that Article 10 *covers* artistic expression.

In terms of the European Court of Human Rights' case law such an assumption is not, however, contentious; the Court having expressly accepted Article 10's applicability to artistic expression since 1988 and the case of *Müller v. Switzerland*. Accordingly, of greater interest, is the variability of protection afforded to different categories of expression by the Court's expansion and contraction of the margin of appreciation. As Chapter Three sought to establish, the Court's approach to the categorisation of expression, through the employment of the doctrine of the margin of appreciation, can be seen to broadly align with the theses advanced by Schauer, Blocher and Sunstein. In this regard, significance is placed upon the correlation between the values recognised as underpinning Article 10 and the extent to which the expression in question can be regarded as furthering those values: the more the expression can be seen to contributing to public discourse the greater *de facto* protection it is likely to receive.

Of course, such variability in protection is not necessarily theoretically unsound. To suggest otherwise would be to run the risk of conflating the necessary distinction between coverage and protection in order to avoid the rigidity with which the categorical-absolutists' credo operates: a position that the Court clearly avoids. Nevertheless, in teasing out the rationale employed by European Court of Human Rights in its case law concerning

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<sup>576</sup> Whilst Article 10 stipulates that the right to freedom of expression, "shall *include* freedom to...receive and impart information and ideas," such that it may not necessarily be *limited* to the conveyance of information and ideas, one may infer the significance of 'information' and 'ideas' for freedom of expression within Article 10 from the Court's preference for expression that contributes to public discourse.

specifically artistic expression, it will be suggested that the category of artistic expression sits rather precariously within the framework of Article 10. In part this is because of the very nature of artistic expression and its vexatious relationship with freedom of expression more generally.

As such, the subject matter to which artists often tend towards and the inherently visceral manner in which the chosen subject matter is treated may be seen to leave artistic expression in something of a quandary within the operation of Article 10. For instance, as we shall see in the cases of *Otto-Preminger-Institut*, *Wingrove* and *I.A. v. Turkey*, there is ample scope for the depiction of religion in art to lead to controversy and the offense of religious sensitivities. The rationale employed by the Court in finding there to be no violation of Article 10 in such instances may in large part, it will be suggested, be based on the failure of the Court to actively engage with the specific relationship that exists between artistic expression and freedom of expression doctrine more generally. Thus, by bestowing the State with a wide margin (on account of the lack of consensus on the issues concerning morals and religion) so as to limit the Court's scrutiny of review, the qualities specifically pertaining to artistic expression are overlooked and its very value, as a form of expression within Article 10, undermined. It is in this sense, in particular, that it is perhaps regrettable that Article 10 does not make explicit reference to artistic expression's inclusion: its absence undermining the relationship artistic expression is seen to have within the broader freedom of expression discourse.

Notwithstanding Article 10's silence on the issue of artistic expression over the course of the development of the European Court of Human Rights' jurisprudence there has been a certain liberalisation in its approach to artistic expression according to which the qualities particular to art and artistic expression *have*, on occasion, been recognised and incorporated in to its assessment of the necessity and proportionality of the State's interference with the applicant's right to freedom of expression. However, in line with the analysis provided in Chapter Three, the Court's engagement with the qualities pertaining to artistic expression is largely dependent upon the perceived 'politicalness' of the work in question and not on it being artistic expression *per se*.

Whilst the judicial recognition of the qualities of artistic expression is to be broadly welcomed, there remains a certain doctrinal uneasiness with the approach adopted by the European Court of Human Rights according to which the extent to which the Court is

willing to engage in an assessment of the expression's artistic qualities is necessarily dependent upon its initial recognition of the art work in political terms. Such an approach, it will be suggested, is therefore not indicative of a recognition, on the part of the European Court of Human Rights, of the importance of artistic expression as a sui generis category of expression on its own terms.

In order to offer a systematic analysis of the European Court of Human Rights' artistic expression case law, from which comparisons between the cases are most acutely seen, the analysis to follow will be approached in terms of the predominant limitation clause(s) within Article 10(2) relied upon by the State in each case. Accordingly, the case law analysis will be divided in to three sections: protecting the rights of others in the sphere of public morals, protecting the rights of others with regards to defamation and, finally, with regards to protecting national security, territorial integrity and the prevention of disorder and crime.

Before turning to the substantive review of the European Court of Human Rights' jurisprudence pertaining to specifically artistic expression, in the interest of contextualisation, it is first instructive to consider the Court's seminal judgment in *Handyside v. UK*, a case which predated the Court's first explicit inclusion of artistic expression within the coverage of Article 10 by some twelve years.

#### **4.3.2 *Handyside v. UK*: Article 10's applicability to offensive, shocking and disturbing expression**

No account of freedom of expression under the European Convention on Human Rights would be complete without reference to the case of *Handyside v. UK*.<sup>577</sup> Whilst the facts pertaining to *Handyside* and the European Court of Human Rights' subsequent judgment are well known it is worth rehearsing them presently in order to more fully contextualise the Court's developing jurisprudence concerning artistic expression. Indeed, given art's inherent challenging of the status quo, the Court's infamous declaration that Article 10 applies "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population"<sup>578</sup> would appear to offer a prima facie strong

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<sup>577</sup> *Handyside v. UK* (1976) (HUDOC)

<sup>578</sup> *Handyside*, *op cit*, para. 49

protection for artistic expression. However, in finding there to be no violation of Article 10 in *Handyside*, the rationale employed by the Court may be seen as informing the background against which its subsequent jurisprudence concerning artistic expression's relatively low *de facto* protection developed.

The case of *Handyside* concerned the publication of a book entitled *The Little Red Schoolbook*, a reference book intended for adolescents covering a range of issues including sections on sex and drugs. In particular, the chapter concerning sex contained further sections on, *inter alia*, masturbation, orgasm, intercourse, contraceptives, menstruation, pornography, homosexuality, venereal diseases, and legal and illegal abortion.<sup>579</sup> The applicant was subsequently prosecuted under the Obscene Publications Act 1964 following complaints from members of the public.

In its preliminary assessment of the case, the European Court of Human Rights accepted that, in addition to the applicant's criminal conviction, the State's seizure and destruction of the book amounted to an interference with the applicant publisher's right to freedom of expression.<sup>580</sup> Furthermore, in following the framework provided by Article 10, it was accepted that the State's interference was prescribed by law (it not being contested that the interference was based on the Obscene Publication Act 1964) and that the interference sought to ensure the protection of public morals.<sup>581</sup> Accordingly, it was left to the European Court of Human Rights to assess whether the States actions were necessary and proportionate in meeting the legitimate aim ensued.

In finding that there had in fact been no violation of Article 10 in *Handyside* the European Court of Human Rights was keen to recognise that, "the machinery of protection established by the Convention is *subsidiary* to the national systems safeguarding human rights."<sup>582</sup> Accordingly, it was said that the State enjoys a margin of appreciation within which to interpret the necessity of interferences with individuals' human rights subject to a European supervision.<sup>583</sup> Therefore, whilst the State's margin of appreciation was not unlimited, the lack of pan-European consensus on the issues concerning morality indicated a relatively wide margin of appreciation open to the State.<sup>584</sup> Accordingly, the Court limited

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<sup>579</sup> *Handyside, op cit*, para. 20

<sup>580</sup> *Handyside, op cit*, para. 43

<sup>581</sup> *Handyside, op cit*, paras. 44-46

<sup>582</sup> *Handyside, op cit*, para. 48 (Citing the 'Belgian Linguistic' case (1968) para. 10)

<sup>583</sup> *Handyside, op cit*, paras. 48-49

<sup>584</sup> See, especially, *Handyside, op cit*, para. 48

its review to the question of “whether the reasons given by the national authorities to justify the actual measures of ‘interference’ they take are *relevant* and *sufficient*.”<sup>585</sup>

In this regard, in accepting that the measures taken against the applicant the Court placed significance on the nature of the book and its intended audience, noting that *The Little Red Schoolbook*, “could [be] interpreted as an encouragement to indulge in precocious activities harmful for [adolescents] or even to commit certain criminal offences” such that it was accepted that the State had pursued a legitimate aim within the context of Article 10(2).<sup>586</sup> Moreover, and with regards to the necessity of the State’s interference, in refuting the argument advanced by the applicant in which it was submitted that the measures taken could not be considered as necessary owing to the fact that similar prosecutions in other countries in which the book had been published were not forthcoming, the Court again relied on the relatively wide margin of appreciation available to the State presently. Accordingly, it was determined that, “[t]he Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories; they have had regard, inter alia, to the different views prevailing there about the demands of the protection of morals in a democratic society.”<sup>587</sup> Thus, given the variability of conceptions of morals across Europe (notwithstanding the fact that there appeared to be a consensus with regards to the morality of *The Little Red Schoolbook* in particular) the Court maintained that it is for each State to determine the most appropriate, domestically sensitive, approach.

There is, as such, a certain juxtaposition to have emerged from within the case of *Handyside* regarding the protection of controversial expression that will be shown to permeate the Court’s subsequent case law concerning the freedom of artistic expression within Article 10. On the one hand, freedom of expression is recognised as constituting “one of the essential foundations of...a [democratic] society, one of the basic conditions for its progress and for the development of every man,” such that the interest of pluralism, tolerance and broadmindedness require the protection of expression even capable of causing offense.<sup>588</sup> On the other hand, however, lies the Court’s application of the doctrine of margin of appreciation, the widening of which in cases concerning morality – a subject matter to which artistic expression is invariably drawn – through the ceding of responsibility to national authorities, prompts a certain distancing of the Court from

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<sup>585</sup> *Handyside, op cit*, para. 51

<sup>586</sup> *Handyside, op cit*, para. 52

<sup>587</sup> *Handyside, op cit*, para. 57

<sup>588</sup> *Handyside, op cit*, para. 49

engaging in a comprehensive analysis of the interference in question. Having noted this discrepancy, it is time now to turn to the European Court of Human Rights' jurisprudence concerning specifically artistic expression.

#### **4.3.3 An overview of the early decisions concerning questions of admissibility**

##### ***Gay News Ltd. and Lemon v. United Kingdom*<sup>589</sup>**

In the summer of 1976, the magazine *Gay News* published *The Love That Dares To Speak Its Name*, a poem written by Professor James Kirkup. Accompanying the poem's text was an illustration relating to the poem's subject matter. Described by the critic Philip Hobsbaum as one of the 20<sup>th</sup> century's 'genuine masters of verse'<sup>590</sup>, James Kirkup gained a significant degree of prominence for his 'increasingly risqué' works, of which *The Love That Dares To Speak Its Name*, and the subsequent controversy surrounding its publication, brought especial notoriety.<sup>591</sup> In addition to the suggestion that Christ had lived a promiscuous life and had engaged in homosexual activities with his disciples, John the Baptist and Pontius Pilate, *The Love That Dares To Speak Its Name* ostensibly concerned an explicit, first-hand, account of a Roman centurion's fantasies of engaging in acts of sodomy and fellatio with the body of Jesus Christ following his crucifixion.<sup>592</sup> Amid the ensuing outcry, the poem was heralded by its supporters as a, "celebrat[ion of] the absolute universality of God's love."<sup>593</sup> For its detractors, *The Love That Dares To Speak Its Name* amounted, in its blasphemy, to the, "re-crucifixion of Christ by 20th-century weapons."<sup>594</sup>

Following the failure of the Director of Public Prosecutions to initiate proceedings against *Gay News*, a private prosecution was sought by Mary Whitehouse – founder of the *National Viewers' and Listeners' Association*, an organisation devoted to campaigning against the broadcasting of supposedly harmful and offensive material. In particular, it was alleged

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<sup>589</sup> (1983) 5 E.H.R.R. 123

<sup>590</sup> Philip Hobsbaum, see *The Guardian*, 16<sup>th</sup> May 2009, Obituary available at: <https://www.theguardian.com/books/2009/may/16/obituary>

<sup>591</sup> <http://www.independent.co.uk/news/obituaries/james-kirkup-poet-author-and-translator-who-also-wrote-approximately-300-obituaries-for-the-1685745.html>

<sup>592</sup> *Gay News*, *op cit*, p. 124

<sup>593</sup> <http://www.telegraph.co.uk/news/obituaries/culture-obituaries/books-obituaries/5314221/James-Kirkup.html>

<sup>594</sup> <http://www.independent.co.uk/news/obituaries/james-kirkup-poet-author-and-translator-who-also-wrote-approximately-300-obituaries-for-the-1685745.html>

that the applicants had, “unlawfully and wickedly published...a blasphemous libel concerning the Christian religion, namely an obscene poem and illustration vilifying Christ in His life and in his crucifixion.”<sup>595</sup> Before a jury at the court of first instance, the magazine’s publisher and its editor were found guilty of the common law offence of blasphemous libel and were fined £1000 and £500 respectively.<sup>596</sup> In upholding the lower court’s decision, the Court of Appeal confirmed that the trial judge had not erred in directing the jury that, firstly, they should find the applicants guilty if they considered that the poem vilified Christ and that, secondly, there was no further need to establish the applicants’ intent to do so, beyond the intention of publication *simpliciter*.<sup>597</sup> In its assessment of only the latter point of law – namely the strict liability nature of the offence of blasphemous libel – the House of Lords again concurred, albeit by a majority of three to two.<sup>598</sup> However, despite its ultimate confirmation that the offence of blasphemous libel was indeed one of strict liability, and with the exception of one law lord, there was agreement across the bench that the state of the law on this matter was far from certain.<sup>599</sup> Accordingly, in their submissions to the Commission, the applicants sought to challenge their convictions wholesale, arguing that the offence of blasphemous libel was not prescribed by law, did not pursue a legitimate aim within the meaning of Article 10 and was not necessary in a democratic society.

The House of Lords’ recognition of a degree of uncertainty surrounding the strict liability nature of blasphemous libel notwithstanding, the Commission was not persuaded by the applicants’ assertion that the offence was not prescribed by law. In particular, it was reasoned that the domestic courts had not deviated from ‘a reasonable interpretation’ of the law as it stood. Accordingly, whilst the law regarding whether the offence of blasphemous libel was one of strict liability or not was hitherto uncertain, it was not the case, so the Commission reasoned, that the English courts had created new law in the sense that it had overturned previous decisions in which evidence of intent to blaspheme *had* been welcomed.<sup>600</sup> Instead, the Commission concurred with the government’s position that the courts had simply clarified the existing law.<sup>601</sup>

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<sup>595</sup> Gay News, *op cit*, p. 124

<sup>596</sup> Gay News, *op cit*, p. 124. In addition, the editor was sentenced to nine months’ imprisonment, suspended for 18 months but quashed on appeal.

<sup>597</sup> Gay News, *op cit*, p. 125

<sup>598</sup> Gay News, *op cit*, p. 125

<sup>599</sup> Gay News, *op cit*, p. 125

<sup>600</sup> Gay News, *op cit*, p. 129

<sup>601</sup> Gay News, *op cit*, pp. 127, 129

With regards to the question of whether their convictions under the offence of blasphemous libel pursued a legitimate aim within the meaning of Article 10, the applicants pointed to the fact that their prosecution was brought by a private individual after the state authorities themselves decided not to pursue criminal proceedings.<sup>602</sup> Accordingly, for the applicants, it could not be said that their prosecution was truly necessary in advancing the state's purported goals of preventing public disorder, protecting public morals or protecting the rights of others.<sup>603</sup> Nonetheless, the Commission maintained that the question be addressed from the perspective of the rights of the private prosecutor. Since, it was reasoned, the crime of blasphemous libel's 'main purpose' was to protect the citizenry from being offended in their religious beliefs, the fact that the prosecution was instigated by such an offended citizen worked to confirm that the offence did, indeed, seek to protect the rights of others.<sup>604</sup>

Finally, on the question of the law's necessity in a democratic society, the Commission went on to hold that the blasphemy laws, "could be considered as necessary in the circumstances of this case," and thereby confirming absolutely that the allegation of a violation of Article 10 was manifestly unfounded within the meaning of Article 27(2).<sup>605</sup> In somewhat tortuous reasoning, the Commission held that:

the existence of an offence of blasphemy does not as such raise any doubts as to its necessity: If it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offence triable at the request of the offended person.<sup>606</sup>

Furthermore, it was asserted that, "[i]t is in principle left to the legislation of the State concerned how it wishes to define the offence, provided that the principle of proportionality...is being respected."<sup>607</sup> On this point, and in light of the fact that, throughout the appellate system, a number of courts agreed with the private prosecutor's belief that James Kirkup's poem was blasphemous, the absence of requiring *mens rea* in

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<sup>602</sup> Gay News, *op cit*, pp. 129-130

<sup>603</sup> Gay News, *op cit*, p. 129

<sup>604</sup> Gay News, *op cit*, p. 130

<sup>605</sup> Gay News, *op cit*, p. 131

<sup>606</sup> Gay News, *op cit*, p. 130

<sup>607</sup> Gay News, *op cit*, p. 130



establishing the offence of blasphemous libel could not be said to be disproportionate, such that the application was deemed inadmissible.<sup>608</sup>

***Choudhury v. United Kingdom***<sup>609</sup>

The case of *Choudhury* emerged from the controversy surrounding the publication of Salman Rushdie's Whitbread Award-winning novel, *The Satanic Verses*. The weeks and months following the book's publication saw, *inter alia*, demonstrations against the alleged blasphemous nature of the work and book burnings in Bolton and Bradford, the deaths of at least six people during riots in Islamabad, attacks on the premises of bookshops and publishers associated with the novel, the banning of the book in India and South Africa and, not least, the imposition of a fatwa by the Iranian spiritual leader Ayatollah Khomeini, calling for the death of Salman Rushdie and forcing the author in to hiding.<sup>610</sup>

In the first instance, the applicant in *Choudhury* – a British citizen of Islamic faith – sought a summons for the criminal prosecution of *The Satanic Verses*' author, Salman Rushdie, and his publisher on the basis that they had 'unlawfully and wickedly' published blasphemous libels against Allah, the Prophet Mohammed and, more generally, the religion of Islam.<sup>611</sup> The original decision – in which the applicant's claim was dismissed on the basis that the offence of blasphemy applied only to Christianity – was upheld during the subsequent judicial review proceedings.<sup>612</sup> Given the clarity of the law concerning the offence of blasphemy and its applicability only to the Christian religion, it was held that it was for Parliament alone, and not the courts, to extend the offence's scope.<sup>613</sup> Moreover, with regards to the applicant's argument that the State's failure to bring a criminal prosecution violated his Article 9 right to freedom of religion under the ECHR, whilst it was recognised that 'criticism' or 'agitation' against a religious group may, as a matter of degree, prevent its members from manifesting their religious beliefs, "nothing remotely like that had been demonstrated by the applicant."<sup>614</sup>

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<sup>608</sup> Gay News, *op cit*, pp. 130-131

<sup>609</sup> Application No. 17439/90

<sup>610</sup> For an overview of the timeline of the events surrounding *The Satanic Verses* crisis, see *The Satanic Verses: A Chronology*, Index on Censorship, 37:4, 144-147 (2008). For further background, see Lisa Appignanesi, *Satanic Moments*, Index on Censorship, 37:4, 154-161 (2008) and Malik, K. *From Fatwa to Jihad: The Rushdie Affair and its Legacy*, Atlantic Books, 2010

<sup>611</sup> *Choudhury v. UK*, *op cit*, p. 1

<sup>612</sup> *Choudhury v. UK*, *op cit*, pp. 1-2

<sup>613</sup> *Choudhury v. UK*, *op cit*, p. 2

<sup>614</sup> *Choudhury v. UK*, *op cit*, p. 2

His remedies exhausted at the domestic level, before the Commission the applicant sought first to argue the more general point that his right to freedom of religion under Article 9 had been violated by the State's refusal to instigate criminal proceedings against Salman Rushdie and his publisher. In particular the applicant maintained that *The Satanic Verses* demonstrated a 'scurrilous attack' on the religion of Islam. Given that the State was not causally related to the alleged interference with the applicant's Article 9 right to freedom of religion, the question facing the Commission centred on whether Article 9 could be interpreted so as to infer the right to bring (criminal) proceedings against those who publish expressions deemed offensive to certain individuals or groups. In (obliquely) answering this question, the Commission stipulated that no link could be found, on the present facts, between the State's failure to act and an interference with Article 9 such that the application was incompatible *ratione materiae* with the ECHR. Accordingly, since no interference with Article 9 could be found, the applicant's second submission – that the application of the UK's blasphemy laws, in so far as they protected only the Christian faith, were discriminatory and therefore in contravention of Article 14 of the ECHR – was also found to be incompatible, thus rendering the application inadmissible.<sup>615</sup>

***S. and G. v. United Kingdom***<sup>616</sup>

In the winter of 1987, G – a fine artist and sculptor – intended to display his work, entitled *Human Earrings*, as part of S's 'Animals' exhibition. The sculpture comprised of a plastic model's head with a freeze-dried human foetus of three to four months' gestation attached to each ear by way of a fitting screwed in to the foetus' skull.<sup>617</sup> Shortly after the exhibition's opening G's sculpture was seized by the police and the artist, as well as the gallery owner, were charged and convicted under the common law offence of outraging public decency.<sup>618</sup>

That the prosecution was brought under the common law offence of outraging public decency was of particular significance in as much as it did not allow the applicants to put forward any defence based on artistic merit.<sup>619</sup> Accordingly, at appeal, the applicants

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<sup>615</sup> *Choudhury v. UK, op cit*, p. 3

<sup>616</sup> Application No. 17634/91

<sup>617</sup> *S and G v. UK*, pp. 1-2

<sup>618</sup> *S and G v. UK*, p. 2

<sup>619</sup> For an overview of the distinction see, for example, Kearns, P. (n 16) at 48-49; and Kearns, P. *Obscene and Blasphemous Libel: misunderstanding art*, (2000) *Criminal Law Review* 652

maintained that they should have been prosecuted, if at all, under the Obscene Publications Act 1959 for which a defence of artistic merit *was* available.<sup>620</sup> In rejecting this argument, the Court of Appeal sought to confirm the propriety of the applicants' prosecution under the common, rather than statutory, law by elaborating on the 'factual and moral' distinction between the two offences. Accordingly, it was deemed that the Obscene Publications Act 1959 concerned the prohibition of those things that tend to 'deprave and corrupt public morals' as set against 'the recognised standards of propriety' whereas the focus of the common law offence of outraging public decency lay in those materials with a tendency to provoke 'revulsion, disgust and outrage', irrespective of the presence or absence of public morals.<sup>621</sup> Moreover, despite the applicants' arguments to the contrary, the Court of Appeal held that, since the House of Lords' confirmation in the 1973 case of *Kneller*<sup>622</sup>, the common law offence of outraging public decency was indeed well-established in English law and required no specific *mens rea* on the part of the applicants.<sup>623</sup>

Consequently, during proceedings before the Commission, the applicants sought to establish that there had been an unjustified interference with their rights to freedom of expression under Article 10 which, as we shall see, since the case of *Müller* explicitly incorporated both the creation and dissemination of artistic works.<sup>624</sup> In substantiating their claim, the applicants argued that the offence of outraging public decency was neither prescribed by law (in the sense that the offence was not sufficiently accessible or foreseeable) nor necessary in democratic society.<sup>625</sup> Furthermore, it was alleged that, given the unavailability of a defence of artistic merit, the interference was disproportionate in its attempt to further its purported aims since it precluded any real possibility of appropriately balancing the conflicting interests.<sup>626</sup>

With regards to the applicants' first argument – concerning whether the common law offence of outraging public decency was prescribed by law – the Commission reached a conclusion in the affirmative. In reaching its decision that the offence of outraging public decency was, indeed, prescribed by law, the Commission took note of the precedent confirmed in *The Sunday Times v. UK* that, whilst laws must be sufficiently accessible and

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<sup>620</sup> *S and G v. UK*, p. 2; See Obscene Publications Act 1959, s. 2(4)

<sup>621</sup> *S and G v. UK*, p. 2

<sup>622</sup> *R v. Kneller (Publishing, Printing and Promotions) Ltd.* (1973) AC 435

<sup>623</sup> *S and G v. UK*, p. 2

<sup>624</sup> *S and G v. UK*, p. 3

<sup>625</sup> *S and G v. UK*, p. 3

<sup>626</sup> *S and G v. UK*, pp. 3-4

clear, the foreseeability of the law's application nevertheless need not be of absolute certainty.<sup>627</sup> Moreover, the Commission reaffirmed that, "No importance can...be attached to the fact that the offence for which the applicants were prosecuted was a creature of the common law and not of legislation."<sup>628</sup> Accordingly, it was recognised that the relevant law was 'accessible' since at least 1973 and the case of *Knüller* and that, furthermore, the distinction made in the *Knüller* judgment regarding the differences between the common law offence of outraging public decency and the statutory offence of obscenity indicated that the applicants did have a sufficiently clear indication of the foreseeability of their prosecution under the common, rather than statutory, law.<sup>629</sup>

In response to the applicants' argument that, in circumventing the availability of a defence of artistic merit, as required under the Obscene Publications Act 1959, the implementation of the common law offence of outraging public decency was disproportionate and would produce a chilling effect on artistic expression, the Commission referred to the doctrine of the margin of appreciation.<sup>630</sup> In particular, it was noted that the State has a wide margin of appreciation with regards to the protection of morals and that, "[b]y reason of their direct and continuous contact with the vital forces of their countries, States are in principle in a better position than the Convention organs to assess the necessity of a restriction on artistic freedom...".<sup>631</sup> Accordingly, given the nature of the *Human Earrings* and the fact that the exhibition was open to the public the Commission concluded that it was not unreasonable for the English courts to find that the work was an outrage to public decency such that the application was deemed to be manifestly ill-founded within the meaning of Article 27(2) of the ECHR.<sup>632</sup>

### ***Ben El Mahi and others v. Denmark***<sup>633</sup>

In September 2005 a Danish newspaper – *Morgenavisen Jyllands-Posten* – invited members of the Danish Newspaper Illustrators' Union to submit cartoons depicting the prophet Muhammad 'as they saw him'. Subsequently, a dozen such illustrations – of which the majority caricatured the prophet Muhammad – were published in *Morgenavisen*

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<sup>627</sup> Eur. Court H.R., *The Sunday Times* judgment of 26 April 1979, Series A no. 30, para. 49

<sup>628</sup> *S and G v. UK*, p. 4

<sup>629</sup> *S and G v. UK*, p. 4

<sup>630</sup> *S and G v. UK*, p. 5

<sup>631</sup> *S and G v. UK*, p. 5 (Citing Müller, paras 33-5)

<sup>632</sup> *S and G v. UK*, p. 5

<sup>633</sup> Application No. 5853/06

*Jyllands-Posten* accompanied by an article entitled ‘The face of Muhammad’, in which the reasoning behind the newspaper’s decision to publish the responding cartoonists’ works was outlined. In particular, under the heading of ‘Freedom of expression’, the article stated:

Some Muslims reject modern secular society. They demand special status, insisting on special consideration of their own religious feelings. This is incompatible with secular democracy and freedom of expression, where one has to be prepared to put up with scorn, mockery and ridicule. While this is not always agreeable or pleasant to watch, and does not mean that religious feelings can be made fun of at any price, that is a minor consideration in the present context...we are on a slippery slope, with no one able to predict where self-censorship will lead.

The ramifications of *Morgenavisen Jyllands-Posten*’s decision to publish the cartoons were considerable, sparking violence and sustained international controversy at the highest levels. To summarise, in the weeks and months following the cartoons’ initial publication, a 5000-strong demonstration was held in Copenhagen, death threats were received by the cartoonists involved, Saudi Arabian and Libyan ambassadors were recalled from their embassies in Denmark and boycotts of Danish produce were established.<sup>634</sup> Against this backdrop, nearly half a year after the initial publication, the newspaper’s editor-in-chief apologised for the offence caused to Muslims and conceded that the cartoons had given rise to ‘serious misunderstandings’.<sup>635</sup> The following day saw a number of European newspapers reprint the cartoons, the apparent intention being to bolster freedom of expression in light of the purportedly appeasing nature of *Morgenavisen Jyllands-Posten*’s apology.<sup>636</sup>

The cartoons’ republication prompted further backlash that was to spread across Asia and the Middle East. Protests in Pakistan saw ‘western-linked’ businesses attacked and left three people, including an eight-year-old boy, dead whilst, in the Philippines, Danish flags were burnt outside the Danish consulate and a boycott of Danish produce was introduced by Indonesia’s trade association.<sup>637</sup> The cartoons’ controversy continued in subsequent years, with diplomatic relations being further tested within the military context of NATO and leading some to fear that the crisis might destabilise NATO and turn it ‘into the hostage

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<sup>634</sup> The Guardian, *How cartoons fanned flames of Muslim rage*, (5<sup>th</sup> February 2006). Available at: <https://www.theguardian.com/media/2006/feb/05/pressandpublishing.religion>

<sup>635</sup> The Guardian, *Danish paper sorry for Muhammad cartoons* (31<sup>st</sup> January 2006). Available at: <https://www.theguardian.com/media/2006/jan/31/religion.saudi-arabia>

<sup>636</sup> The Guardian, *How cartoons fanned flames of Muslim rage*, (5<sup>th</sup> February 2006). Available at: <https://www.theguardian.com/media/2006/feb/05/pressandpublishing.religion>

<sup>637</sup> The Guardian, *Western businesses burn in Pakistan riots*, (16<sup>th</sup> February 2006). Available at: <https://www.theguardian.com/world/2006/feb/16/pakistan.declanwalsh>

of a clash with Islam'. Only after intense negotiations did Turkey agree to revoke the veto it had previously placed on the election of the Danish prime minister to NATO's head, on the grounds of his support for freedom of expression during the cartoons' initial controversy.<sup>638</sup> Furthermore, in 2010, four years after his notorious cartoon – in which a Muslim figure, alleged by some to be the prophet Muhammad, was depicted with a lit bomb concealed within his turban – was published, Kurt Westergaard was the subject of an assassination attempt when a man broke in to Westergaard's premises yielding a knife and an axe.<sup>639</sup>

The implications of what has become to be known as the 'Danish cartoon crisis' were, as such, of profound significance. What began with the intention of 'provok[ing] a debate about the extent to which we self-censor in our coverage of Muslim issues'<sup>640</sup> – an issue that was itself prompted by the revelation that illustrators had sought anonymity for their association with the publication of a children's book – soon manifested itself as a truly global crisis in which the ensuing debate centred on the appropriate limitations on freedom of expression. In light of the subsequent controversies surrounding, for instance, *The Innocence of Muslims* and the fateful events following *Charlie Hebdo*'s decision to publish similar cartoons, it is therefore unfortunate – albeit understandable – that the European Court of Human Rights declared the application in *Ben El Mahi and others v. Denmark* to be inadmissible, thereby denying the Court with the opportunity to further examine the relationship between freedom of expression, blasphemy and offence in the twenty-first century.

In short, the application was deemed to be inadmissible on the basis that no jurisdictional link could be established between the applicants – who were Moroccan nationals and organisations based exclusively in Morocco – and the state of Denmark.<sup>641</sup> Under Article 1 of the ECHR, contracting states are obliged to secure convention rights "to everyone within their jurisdiction" – a term that has, with reference to the *travaux préparatoires*, been primarily interpreted with reference to a State's territorial jurisdiction with specific exceptions relating to overseas military actions that were not relevant in the present

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<sup>638</sup> The Guardian, Bitter Turkey finally lifts veto on Danish PM as Nato chief, (5<sup>th</sup> April 2009). Available at: <https://www.theguardian.com/world/2009/apr/05/nato-eu-denmark-turkey>

<sup>639</sup> The Guardian, *The Danish cartoonist who survived an axe attack*, (4<sup>th</sup> January 2010). Available at: <https://www.theguardian.com/world/2010/jan/04/danish-cartoonist-axe-attack>

<sup>640</sup> The Guardian, *How cartoons fanned flames of Muslim rage*, (5<sup>th</sup> February 2006). Available at: <https://www.theguardian.com/media/2006/feb/05/pressandpublishing.religion>

<sup>641</sup> *Ben El Mahi and others v. Denmark*, p. 8

instance.<sup>642</sup> Accordingly, the applicants' allegations of discrimination, with respect to Articles 9 (freedom of religion) and 14 (freedom from discrimination), as well as the complaint that Denmark had 'allowed' the publication of offensive cartoons, contrary to Article 17 in conjunction with Article 10, could not be further examined by the Court.

From the perspective of seeking to identify a comprehensive rationale underpinning the Court's approach to artistic expression it is therefore unfortunate that the case of *Ben El Mahi and others v. Denmark* could not be heard on its merits. Given that the application emerged from the Danish Director of Prosecutions' *refusal* to initiate legal proceedings against *Morgenavisen Jyllands-Posten* for the offence caused to Muslims – and thereby, as we shall see, distinguishing the present case from the Court's earlier otherwise comparable case law of *Otto-Preminger* and *Wingrove* – *Ben El Mahi and others* would have afforded the Court with the opportunity to clarify its position with regards to the extent of freedom of (artistic) expression's protection when religious sensitivities are involved.

In particular, given width of the margin of appreciation normally afforded to states responding to matters of religion and morality it would have been interesting to see the extent to which the Court accepted the rationale employed by the Danish Director of Prosecutions in deciding not to launch legal proceedings. Were it not for matters of jurisdiction, *Ben El Mahi and others* would therefore have offered the opportunity to explore the extent to which the state is imbued with a positive duty to minimise or prevent the causing of offence and, in turn, proffer a rationale more explicit and comprehensive in its scope than is currently the case.

For instance, crucial to the Director of Prosecutions' determination was its assessment of whether, in line with Article 140 of the Danish Criminal Code, the cartoons amounted to 'mockery' or 'scorn' of Islam's religious doctrines or acts of worship.<sup>643</sup> Accordingly, in its assessment of Danish law, the Director of Prosecutions sought to define 'mockery' in terms of a lack of respect for, and the ridiculing or derision of, the object of mockery whilst 'scorn' was defined as an "expression of contempt for the object that is scorned."<sup>644</sup> Moreover, in reserving Article 140's application for the most serious of cases, it was

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<sup>642</sup> *Ben El Mahi and others v. Denmark*, pp. 7-8. Citing *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 59-65, ECHR 2001-XII, and *Issa and Others v. Turkey*, no. 31821/96, §§ 65-71, 16 November 2004

<sup>643</sup> *Ben El Mahi and others v. Denmark*, p.4

<sup>644</sup> *Ben El Mahi and others v. Denmark*, p.4

asserted that, in order for Article 140 to be successfully invoked, there needed to be ‘a certain element of abuse’.<sup>645</sup> In light of the fact that there was considered to exist no consensus as to the (im)propriety of depicting the prophet Muhammed – such that the depiction of Muhammad could not, *per se*, be considered to violate Article 140 of the Danish Criminal Code, the Director of Prosecutions moved on to consider whether the twelve cartoons, individually, demonstrated sufficient levels of ‘mockery’ or ‘scorn’.<sup>646</sup>

Accordingly, eight of the twelve cartoons were deemed by the Director of Prosecutions to be either ‘neutral in their expression’ or otherwise lacking in the requisite degree of derision or spite.<sup>647</sup> Again, given that the Director of Prosecutions provided no elaboration as to which cartoons were deemed to be neutral and which, although not neutral, did not amount to ‘mockery’ or ‘scorn’ the Court’s assessment of the facts would have been instructive. Whilst certain of the cartoons were relatively benign (one, for instance, depicted the face of a man whose beard and turban were stylised in the form of a crescent moon and star) others were, arguably, less so. One might, with relative ease, maintain that the now infamous cartoon depicting a cloud scene with a bearded man wearing a turban exclaiming, “Stop, stop, we’ve run out of virgins!”, to a group of other, similarly bearded and attired, men seeking to enter heaven after having been, one presumes, involved in a suicide bombing, was capable of amounting to ‘scorn’.

A further two of the remaining cartoons were considered an attempt to portray women in Islamic society. One contained heavily stylised images of Islamic women with the caption, “Prophet! You crazy bloke! Keeping women under the yoke!” whilst the second depicted a bearded man, his eyes blanked out, wearing a turban and carrying a sword whilst standing in front of two women wearing niqabs such that only their eyes could be seen. As such, the Director of Prosecution considered that the cartoons related to social conditions and did not, therefore, touch on religious doctrine or acts of worship.<sup>648</sup> Potentially more problematic, in as much as it may be construed as insinuating a relationship between Islam or Muslims and violence, was the cartoon in which two turban-wearing, bearded men armed with an array of weaponry are running towards a third, also bearded, man who is saying, “Relax folks! It’s just a sketch done by a non-believer from southern Denmark.” That the third man, who is seen to be deploring violence in a calming manner, might

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<sup>645</sup> *Ben El Mahi and others v. Denmark*, p.4

<sup>646</sup> *Ben El Mahi and others v. Denmark*, p.4

<sup>647</sup> *Ben El Mahi and others v. Denmark*, p.5

<sup>648</sup> *Ben El Mahi and others v. Denmark*, p.5



feasibly be Muhammad led the Director of Prosecutions to surmise that the cartoon could therefore not be said to be an expression of mockery or scorn of Islamic doctrine.<sup>649</sup>

Finally, with regards what was perhaps the most notorious of the twelve cartoons – that depicting a bearded man whose turban contains a lit bomb – it is recognised that the depiction, “could be understood in several ways.”<sup>650</sup> Accordingly, given the nuances often inherent in expression of an artistic nature, it is submitted that it is the absence of further judicial inquiry in to this cartoon that is most frustrating from the point of view of discerning a comprehensive jurisprudence of artistic expression under the Court’s Article 10 case law. Two possible interpretations are proffered by the Director of Prosecutions, both of which take as its starting point, the assumption that the depicted figure is in fact Muhammad. Firstly, it is asserted that if Muhammad is understood as a symbol of Islam then the cartoon could be seen as suggestive of violence being carried out in the name of Islam. Understood in this way, the Director of prosecutions continued, the cartoon could be seen as expressing the view that religious fanaticism has produced terrorism. Thus, the cartoon may be considered as a contribution to contemporary discussions on terrorism. Importantly, under this construction, the Director of Prosecutions asserted that the cartoon was not an expression of ‘mockery’ or ‘scorn’ directed at the prophet Muhammad or Islam more generally but, rather, a criticism of those individuals and groups involved in terrorist activities of a religious nature and therefore did not satisfy the criteria required under Article 140 of the Danish Criminal Code.

Secondly, the Director of Prosecutions accepted that the cartoon might feasibly be understood as suggesting that the prophet Muhammad himself was a violent person. Notwithstanding historical accounts in which Muhammad was indeed shown to have adopted violent methods in seeking to establish Islam, the Director of Prosecutions maintained that the cartoonists’ use of a bomb – an image that, today, is readily associable with terrorism – might well be considered as insulting. Nonetheless, whilst possibly ‘insulting’ the expression did not, according to the Director of Prosecutions, meet the threshold of ‘mockery’ or ‘ridicule’ and “almost certainly” did not amount to ‘scorn’.<sup>651</sup>

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<sup>649</sup> *Ben El Mahi and others v. Denmark*, p.5

<sup>650</sup> *Ben El Mahi and others v. Denmark*, p.5

<sup>651</sup> *Ben El Mahi and others v. Denmark*, p.6

Lying at the crux of the Director of Prosecutions' decision not to pursue an investigation in to the cartoons published by *Morgenavisen Jyllands-Posten* was its assessment that the cartoons were not sufficiently mocking or scornful of either the religion of Islam or its religious practices to trigger Article 140 of the Danish Criminal Code. Thus, whilst in the present instance the newspaper was deemed to have acted lawfully, the Director of Prosecutions sought to clarify *Morgenavisen Jyllands-Posten*'s assertion that, in a secular democracy founded on freedom of expression, religious believers, "ha[ve] to be prepared to put up with scorn, mockery and ridicule." Given that the Danish Criminal Code does indeed protect religious feelings from expressions of scorn and mockery, albeit only in the most serious of cases, *Morgenavisen Jyllands-Posten*'s assertion did not, for the Director of Prosecutions, provide an accurate interpretation of the law.

Accordingly, it was unfortunate that the case of *Ben El Mahi and others v. Denmark* could not proceed to be heard on its merits. Had the application been brought by *Danish*, rather than Moroccan, Muslims or organisations the case might have afforded the Court with the opportunity to test the degree of offence required under Article 140 of the Danish Criminal Code *vis* notions of 'scorn' and 'mockery' against its Article 10 case law pertaining to 'gratuitous offence'. Moreover, given that the present instance differs from the cases of *Otto-Preminger* and *Wingrove* – in that it concerns the failure of the state to act to protect religious sensitivities – the case of *Ben El Mahi and others* would also have forced the Court to offer an insight as to the extent to which the state has a duty to prevent (artistic) expression that offends, *inter alia*, those of a religious persuasion. In so doing, the Court's margin of appreciation doctrine would have been further developed and thereby offering a more comprehensive understanding of the elusive principle.

#### **4.3.4 Protecting the 'rights of others' as a basis for limiting the right to freedom of artistic expression: Public morals and the rights of others**

Of the Court's Article 10 case law pertaining to artistic expression, perhaps the most well-known and commented upon are those in which, as was the case with *Handyside*, the protection of public morality (generally *vis-à-vis* the rights of others<sup>652</sup>) was cited as justification for the interference in question. Much ink has been spilled in analysing and

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<sup>652</sup> Note, of these three cases only *Müller* makes explicit reference to the protection of morals. However, as we shall see, consideration of morals was crucial in both *Otto-Preminger* and *Wingrove* in accepting that the works in question infringed the rights of others, thereby justifying the interference.

critiquing the (relatively) early cases of *Müller*, *Otto-Preminger* and *Wingrove* from the perspective of ascertaining, in light of the infamous *Handyside* dictum, the extent to which Article 10 generally protects a right to offend (or conversely, a right to be offended). Such a discussion is clearly of crucial importance for freedom of expression generally, yet the specific implications of this discourse for specifically *artistic* expression have, to a certain extent and somewhat counter-intuitively, been overlooked. Indeed, as we have seen with regards to the categorisation of expression, the reasoning and outcomes produced by this triumvirate of cases may account for the presumption that artistic expression enjoys lower degree of protection, relative to political expression.

Simultaneously, the fate of the specific artworks in *Müller*, *Otto-Preminger* and *Wingrove* may go some way towards explaining the subsequent paucity of cases concerning controversial artworks being brought before the Court whilst, for the relatively few cases that *have* been heard, one may see, through the rationale employed by the Court in these early cases, the emergence of a framework that inherently discriminates against artistic expression. An examination of these early cases is therefore crucial in order to contextualise and critique the Court's subsequent artistic expression case law.

### ***Müller and others v. Switzerland* (1988)<sup>653</sup>**

#### **OVERVIEW OF THE FACTS**

The case of *Müller* concerned the exhibiting of three Josef Müller paintings – collectively entitled *Three Nights, Three Pictures* – in a Swiss art exhibition. Following a complaint from the father of an adolescent girl who was alleged to have ‘reacted violently’ to Müller’s exhibit, the paintings were removed and seized by the Swiss authorities on the basis, it was later accepted by the European Court of Human Rights, of pursuing the legitimate aims of protecting morals as well as the rights of others.<sup>654</sup> The paintings in question were certainly striking. Indeed, some of the applicants themselves, including the exhibition’s curators, conceded that they too had been shocked by the exhibit. From the domestic courts’ vivid portrayal of the works such feelings are certainly understandable:

...one of the paintings contains no fewer than eight erect members. All the persons depicted are entirely naked and one of them is engaging simultaneously in various

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<sup>653</sup> 13 EHRR 212 (1988)

<sup>654</sup> *Case of Müller and others. v. Austria* 13 EHRR 212 (1988), paras. 12-13 and 30

sexual practices with two other males and an animal. He is kneeling down and not only sodomising the animal but holding its erect penis in another animal's mouth. At the same time he is having the lower part of his back – his buttocks, even – fondled by another male, whose erect penis a third male is holding towards the first male's mouth. The animal being sodomised has its tongue extended towards the buttocks of a fourth male, whose penis is likewise erect. Even the animals' tongues (especially in the smallest painting) are more suggestive, in shape and aspect, of erect male organs than of tongues.<sup>655</sup>

In accordance with the relevant obscenity laws under the Swiss Criminal Code,<sup>656</sup> the applicants were fined and the paintings ordered to be deposited with the Art and History Museum for 'safekeeping'.<sup>657</sup> In reaching its conclusion, the domestic court placed emphasis on the paintings being, "obviously morally offensive to the vast majority of the population," before going on to assert that, "[e]ven with an artistic aim, crude sexuality is not worthy of protection."<sup>658</sup> Moreover, the domestic court reasoned that:

a person of ordinary sensitivity [cannot] be expected to go behind what is actually depicted and make a second assessment of the picture independently of what he can actually see. To do that he would have to be accompanied to exhibitions by a procession of sexologists, psychologists, art theorists or ethnologists in order to have explained to him that what he saw was in reality what he wrongly thought he saw.<sup>659</sup>

Indeed, that consideration ought to be given to nothing other than the paintings' facial depictions was further confirmed on appeal, with the appeal court's categorical stipulation that:

The court is likewise unconvinced by the appellants' contention that the paintings are symbolical. What counts is their *face value, their effect on the observer*, not some abstraction utterly unconnected with the visible image or which glosses over it. Furthermore, the important thing is not the artist's meaning or purported meaning but the objective effect of the image on the observer.<sup>660</sup>

Despite the applicants' further appeals, in which aesthetic elements of the paintings were purportedly given some consideration, the Cantonal Court nevertheless held that the paintings' emphasis was on 'sexuality in its offensive forms' such that, "[t]he *overall*

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<sup>655</sup> Müller, *op cit*, para. 16

<sup>656</sup> Swiss Criminal Code, Article 204

<sup>657</sup> Müller, *op cit*, para. 14

<sup>658</sup> Müller, *op cit*, para. 14

<sup>659</sup> Müller, *op cit*, para. 14

<sup>660</sup> Müller, *op cit*, para. 16 (emphasis added)

*impression...is such as to be morally offensive to a person of normal sensitivity.*”<sup>661</sup> The original court’s decision concerning the imposition of a fine and the confiscation of the paintings stood, leading to the applicants to pursue their case, under Article 10, before the European Court of Human Rights.<sup>662</sup>

## DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS

### ***The European Court of Human Rights’ confirmation of Article 10’s inclusion of artistic expression***

With the earlier case of *Gay News* deemed inadmissible, the facts pertaining to *Müller* offered the European Court of Human Rights with its first opportunity to address the question of specifically artistic expression. Ascertaining the rationale employed by the Court in finding that there was no violation of Article 10 in *Müller* is therefore crucial in order to trace the developments of the Court’s subsequent jurisprudence. In this regard, and in line with the thesis put forward by Schauer concerning the coverage-protection distinction, the first question to be addressed by the Court was whether Article 10 covered artistic expression in the first place; a matter of import given, as it will be remembered, Article 10’s silence on the issue.

In confirming that the guarantees of Article 10 do, in fact, extend to the inclusion of artistic expression, in *Müller* the European Court of Human Rights maintained that:

[Article 10] includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas *of all kinds*.<sup>663</sup>

Moreover, and in addition to citing the express inclusion of artistic expression within the rubric of the International Covenant on Civil and Political Rights’ freedom of expression protections, it was asserted that:

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<sup>661</sup> *Müller, op cit*, para. 18

<sup>662</sup> *Müller, op cit*, para. 18 (emphasis added)

<sup>663</sup> *Müller, op cit*, para. 27 (emphasis added)

[c]onfirmation, if any were needed, that this interpretation is correct, is provided by the second sentence [of Article 10(1)], which refers to ‘broadcasting, television or cinema enterprises’, media whose activities extend to the field of art.<sup>664</sup>

Thus, with relative conceptual ease and little in the way of further explanation, the category of artistic expression was brought squarely within the parameters of Article 10, notwithstanding its silence on the issue. Indeed, to emphasise the point, it was noted by the Court that there was no contention, between the parties present to the dispute, regarding Article 10’s inclusion of artistic expression.<sup>665</sup>

Having proffered a holistic interpretation of Article 10 – according to which no distinction was made between the various forms that expression might take and thus enabling artistic expression’s tacit inclusion within Article 10’s guarantees<sup>666</sup> – the Court’s subsequent assessment in *Müller* followed its established practice.<sup>667</sup> Accordingly, after confirming that the imposition of a fine and the confiscation of *Three Nights, Three Pictures* ‘clearly’ amounted to an interference with the applicants’ right to freedom of expression under Article 10,<sup>668</sup> the Court moved on to assess whether that interference was prescribed by law,<sup>669</sup> pursued a legitimate aim within the meaning of Article 10(2)<sup>670</sup> and, ultimately, whether the interference was necessary in a democratic society.<sup>671</sup> As we shall see below, and in common with much of the case law concerning Article 10 more generally, it was the issue of the interference’s necessity in a democratic society that instigated most of the discussion, both in the opinions of the majority and dissentients as well as in the academic commentary.

### ***Prescribed by law***

In questioning whether the obscenity laws, under which they were convicted, could be said to be prescribed by law, the applicants sought to argue that the vagueness of the term ‘obscenity’ and its lack of definition in the legislation meant that they could not foresee that

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<sup>664</sup> *Müller, op cit*, para. 27

<sup>665</sup> *Müller, op cit*, para. 27

<sup>666</sup> *Müller, op cit*, para. 27

<sup>667</sup> For an overview of this standard practice see, for instance, Harris et al (n 1) at 344-359 and 444; see, also, Chapter 3 *infra*.

<sup>668</sup> *Müller, op cit*, para. 28

<sup>669</sup> *Müller, op cit*, para. 29

<sup>670</sup> *Müller, op cit*, para. 30

<sup>671</sup> *Müller, op cit*, para. 30

the exhibiting of Müller's paintings would have constituted an offence.<sup>672</sup> Moreover, with regards to the paintings' confiscation, it was maintained that since the relevant legislation explicitly required that obscene material be destroyed, the artworks' confiscation could not be said to be prescribed by law.<sup>673</sup> In line with the *Gay News* rationale, the Court disagreed on both points. On the question of the foreseeability of the fine imposed on the applicants, the Court recalled its earlier judgments in which the 'impossibility of attaining absolute precision in the framing of laws' was noted, such that, in the interests of preventing excessive rigidity, a degree of uncertainty would be inevitable.<sup>674</sup>

Indeed, allowing a certain degree of flexibility was considered to be particularly useful in the context of obscenity laws in as much as it allows for the law to develop alongside 'changing circumstances'.<sup>675</sup> Even so, given the development of a consistent body of case law in the domestic courts on the question of publishing obscene materials, the Court concluded that the Swiss obscenity laws were accessible to the applicants within the meaning of Article 10(2).<sup>676</sup>

With regards to the second question – of whether the paintings' confiscation was prescribed by law, given the legislation's stipulation that obscene materials be destroyed – the Court again pointed to developments in Switzerland's case law.<sup>677</sup> Thus, since the early 1960s, in instances concerning material that is culturally significant or irreplaceable, its confiscation has been considered an appropriate and more tempered response in discharging the requirements of the criminal law, namely to ensure that the item is withheld from the public.<sup>678</sup> Again, since these developments were consistently developed and applied in the domestic courts, the paintings' confiscation was sufficiently deemed to be prescribed by law for the purposes of Article 10(2).<sup>679</sup>

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<sup>672</sup> *Müller, op cit*, para. 29

<sup>673</sup> *Müller, op cit*, para. 38

<sup>674</sup> *Müller, op cit*, para. 29 citing *Barthold*, para. 47 and *Olsson*, para. 61.

<sup>675</sup> *Müller, op cit*, para. 29

<sup>676</sup> *Müller, op cit*, para. 29

<sup>677</sup> *Müller, op cit*, para. 38

<sup>678</sup> *Müller, op cit*, para. 38

<sup>679</sup> *Müller, op cit*, para. 38

### *Legitimacy of the aim pursued*

The Court accepted that the imposition of a fine *vis* the obscenity laws applied in the present case were designed to protect public morals and that, through their application, no other ulterior motives capable of infringing the Convention could be attributed to the Swiss authorities.<sup>680</sup> In addition to protecting morals, the government had also maintained that the interference's aim lay in protecting the rights of others; an aim that was purportedly demonstrable in light of the girl's reaction to seeing the paintings. On this point, and with no further elaboration, the Court simply asserted that, "there is a natural link between [the] protection of morals and [the] protection of the rights of others."<sup>681</sup> With regards to the question of whether the confiscation of the paintings pursued a legitimate aim, it was accepted that the confiscation was intended as a means of safeguarding public morals by preventing the repetition of the offence for which the applicants had been convicted.<sup>682</sup>

### *Necessity of the interference in a democratic society*

Having established that the State's interference with the applicants' Article 10 rights was both prescribed by law and pursued a legitimate aim within the meaning of Article 10(2), the final substantive question to be addressed by the Court was whether the interference was nevertheless necessary in a democratic society. In so doing, the Court confirmed that it understood 'necessary' to mean that there existed a 'pressing social need' for the interference<sup>683</sup> and that, whilst the State enjoyed a 'certain margin of appreciation' in determining whether a 'pressing social need' in fact existed, this margin of appreciation remained subject to the supervision of the European Court of Human Rights.<sup>684</sup> In assessing whether the interference may be reconciled with Article 10's freedom of expression guarantees, the Court's 'supervisory jurisdiction' may be seen as adopting a contextual approach according to which the focus of its inquiry is directed at whether, in light of the case as a whole, the interference was proportionate in meeting the legitimate aim being pursued and whether the reasons put forward by the domestic authorities were, in this regard, 'relevant and sufficient'.<sup>685</sup>

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<sup>680</sup> *Müller, op cit*, para. 30

<sup>681</sup> *Müller, op cit*, para. 30

<sup>682</sup> *Müller, op cit*, para. 39

<sup>683</sup> *Müller, op cit*, para. 32 (citing *Lingens*, para. 39)

<sup>684</sup> *Müller, op cit*, para. 32

<sup>685</sup> *Müller, op cit*, para. 32



The importance of freedom of expression notwithstanding – it being recognised as crucial to democracy’s progress as well as to the development of the individual<sup>686</sup> – the Court went on to further explicate the potential for its limitation. Accordingly, whilst offensive, shocking and disturbing expression was included within the parameters of Article 10’s overall coverage, such expression remained subject to the limitation clauses of Article 10(2).<sup>687</sup> As such, notwithstanding the recognition that, “those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society,”<sup>688</sup> in exercising one’s right to freedom of expression consideration must be made of the duties and responsibilities incumbent upon the speaker.<sup>689</sup> Of particular significance in this regard is the Court’s recognition of the variability of these duties and responsibilities, the scope of which is said to, “depend on [the speaker’s] situation and the means he uses.”<sup>690</sup>

Finalising the framework from which it would assess the necessity of both the fine and the paintings’ confiscation was the Court’s reference to the lack of a uniform, pan-European conception of morality, as highlighted in the *Handyside* case.<sup>691</sup> Accordingly, in light of the State authorities’ ‘direct and continuous contact with the vital forces of their countries’ the Court surmised that domestic authorities are, in principle, better placed to respond to matters concerning morals.<sup>692</sup>

In finding that neither the fine nor the paintings’ confiscation amounted to a violation of Article 10 the Court’s reasoning was derived, in large part, from the significant emphasis placed on the State’s margin of appreciation. Despite not explicitly giving an indication of the width of the margin of appreciation to be applied in the present case,<sup>693</sup> the absence of a close scrutiny of the domestic courts’ decisions would, it is suggested, indicate that a wide margin of appreciation was, in fact, in place. Thus, underpinning the majority’s conclusion was its *prima facie* acceptance of the domestic courts’ assessment of the crudity with which the paintings depicted sexual scenes such that, “the Court does *not find unreasonable* the view taken by the Swiss courts that those paintings [...] were ‘liable

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<sup>686</sup> *Müller, op cit*, para. 33

<sup>687</sup> *Müller, op cit*, para. 33 (citing *Handyside*, para. 49)

<sup>688</sup> *Müller, op cit*, para. 33

<sup>689</sup> *Müller, op cit*, para. 34

<sup>690</sup> *Müller, op cit*, para. 34 (citing *Handyside*, para. 49)

<sup>691</sup> See *Handyside, op cit*, para. 48

<sup>692</sup> *Müller, op cit*, para. 35

<sup>693</sup> Cf. *Wingrove*, esp. para. 58

grossly to offend the sense of sexual propriety of persons of ordinary sensitivity.”<sup>694</sup> Moreover, given the (implicitly) wide margin of appreciation available to State, the domestic courts were, according to the Court, ‘entitled’ to consider both the imposition of a fine and the confiscation of the paintings to be necessary for the protection of public morality.<sup>695</sup> That the interference was not unreasonable and could be seen as meeting a pressing social need was further justified, for the Court, with reference to the context from which the facts of *Müller* emerged; particularly with regards to the fact that there had been no entrance fee nor age restriction in place.<sup>696</sup>

### ***Otto-Preminger-Institut v. Austria* (1994)<sup>697</sup>**

#### OVERVIEW OF THE FACTS

The subject of *Otto-Preminger-Institut* was Werner Schroeter’s film *Das Liebeskonzil* (‘Council in Heaven’) which was, in turn, based on Oskar Panizza’s 19<sup>th</sup> century play of the same title, the publication of which led to Panizza’s imprisonment for crimes against religion in 1895.<sup>698</sup> With *Das Liebeskonzil* again becoming the subject of legal proceedings a century later, the play has become, in the words of one leading authority on Panizza’s work, “a...prime litmus test for freedom of artistic expression in Germany, Austria, Switzerland, and beyond.”<sup>699</sup> The implications of the developments made in *Otto-Preminger-Institut* – especially with regards to the Court’s understanding of ‘the rights of others’ and the ‘duties and responsibilities’ of those wishing to exercise their right to freedom of expression – are therefore of profound significance for the freedom of specifically *artistic* expression under Article 10 of the ECHR.

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<sup>694</sup> *Müller, op cit*, para. 36 (emphasis added)

<sup>695</sup> *Müller, op cit*, para. 36. It should be noted that, in *Müller*, the European Court of Human Rights makes no reference to a ‘wide’ or ‘narrow’ margin of appreciation; the actions taken by the national authorities simply being said to have fallen *within* the margin of appreciation afforded to them.

<sup>696</sup> *Müller, op cit*, para. 36

<sup>697</sup> 19 EHRR 34 (1994)

<sup>698</sup> *Otto-Preminger-Institut*, para. 20. A student production of Oskar Panizza’s play, in German, from 1987 (five years after Werner Schroeter’s film version) can be seen here: <http://www.youtube.com/watch?v=2GZf3hVHmK4> (last accessed on 28<sup>th</sup> October 2015)

<sup>699</sup> Brown, P. D. G. *The Continuing Trials of Oskar Panizza: A century of artistic censorship in Germany, Austria, and beyond*, 24 German Studies Review 533 (2001) at 552

Schroeter's film, whilst perhaps less provocative than the original play,<sup>700</sup> certainly remained controversial. God is said to be portrayed as an 'apparently senile old man', whilst Jesus Christ is seen to be a 'low grade mental defective' and the Virgin Mary an 'unprincipled wanton'.<sup>701</sup> The film's plot, in line with that of the play, sees the Virgin Mary leading God and Jesus Christ to the decision that mankind must be punished for its immorality; prompting, to this end, a conspiracy with the Devil to infect mankind with syphilis.<sup>702</sup> Furthermore, Schroeter's film depicts, *inter alia*, God engaging in a 'deep kiss' with the Devil, whom He calls His friend; a 'degree of erotic tension' between the Virgin Mary and the Devil in addition to Jesus Christ 'lasciviously attempting to fondle his mother's breasts, which she is shown as permitting'.<sup>703</sup> Finally, "God, the Virgin Mary and Christ are shown in the film applauding the Devil."<sup>704</sup> Yet, in looking beyond this immediate portrayal of the characters involved, the film's promotional materials stipulated that, "[t]rivial imagery and absurdities of the Christian creed are targeted in a caricatural [sic] mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated."<sup>705</sup> It will be noted, from the outset, that Werner Schroeter's *Das Liebeskonzil* can therefore, at least on its surface, be considered as an attempt to engage, albeit satirically, with matters of general public interest.

Nonetheless, the day before the film was due to be shown in the film house owned by the applicant association the public prosecutor instigated criminal proceedings against the cinema's manager on the basis that *Das Liebeskonzil* 'disparag[ed] religious doctrines', contrary to the Austrian Penal Code. The film was subsequently seized.<sup>706</sup> In dismissing the applicant's appeal concerning the initial seizure of the film, the Court of Appeal maintained that, "artistic freedom was necessarily limited by the rights of others to freedom of religion and by the duty of the State to safeguard a society based on order and tolerance," before going on to assert that, "[t]he wholesale derision of religious feeling outweighed any interest the general public might have in information or the financial interests of persons wishing to show the film."<sup>707</sup> Moreover, and notwithstanding the express protection of artistic expression within the Austrian Basic Law – according to which "limitations of

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<sup>700</sup> For an overview of various productions of *Das Liebeskonzil*, see Brown (n 699) at 536 and generally.

<sup>701</sup> *Otto-Preminger-Institut, op cit*, para. 21 paras. 21-22

<sup>702</sup> *Otto-Preminger-Institut, op cit*, para. 21

<sup>703</sup> *Otto-Preminger-Institut, op cit*, para. 22

<sup>704</sup> *Otto-Preminger-Institut, op cit*, para. 22

<sup>705</sup> *Otto-Preminger-Institut, op cit*, para. 10

<sup>706</sup> *Otto-Preminger-Institut, op cit*, para. 11

<sup>707</sup> *Otto-Preminger-Institut, op cit*, para. 13

artistic freedom are [not] possible by way of an express legal provision but may only follow from the limitations inherent in this freedom – in ordering the forfeiture of the film (thereby precluding any future showing of the film anywhere in Austria) the Regional Court accepted that the film’s depiction of the Roman Catholic religions central figures was “an attack on Christian religion.”<sup>708</sup>

## DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS

### *Prescribed by law*

Having established that the seizure and forfeiture of Schroeter’s *Das Liebeskonzil* amounted to an interference with the applicant film-house’s Article 10 rights, the first substantive issue to be addressed by the Court concerned whether the interference was prescribed by law. On this question, the applicant sought to raise three points concerning the domestic courts’ application of the relevant legislation.<sup>709</sup> Firstly, it was questioned whether artistic expression, as a matter of fundamental principle, could be capable of either disparaging or insulting persons or objects of religious veneration. Secondly, it was argued that even if indignation *could* arise from artistic expression, such indignation ought not be considered to be justified in those who freely chose to watch the film. Finally, in light of the above, the applicant maintained that the right to freedom of artistic expression had not been given sufficient consideration by the domestic courts despite its explicit protection under Article 17a of the Austrian Basic Law. However, in failing to recognise any grounds to suppose that Austrian law had been misapplied, the Court maintained that, “it is primarily for the national authorities...to interpret and apply national law.”<sup>710</sup> The seizure and forfeiture of *Das Liebeskonzil* was therefore considered to be prescribed by law.

### *Legitimate aim*

Moving on to the question of whether the interference pursued a legitimate aim under Article 10(2) the present judgment of the European Court of Human Rights can be seen to proffer more substantiated reasoning than was evident in the previous case of *Müller*. Whereas in *Müller* the State maintained that the interference sought to protect morals as

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<sup>708</sup> *Otto-Preminger-Institut, op cit*, para. 16

<sup>709</sup> *Otto-Preminger-Institut, op cit*, para. 44

<sup>710</sup> *Otto-Preminger-Institut, op cit*, para. 45

well as the rights of others – leading the Court to suggest, without further explanation, that there was a ‘natural link’ between these two aims<sup>711</sup> – in *Otto-Preminger-Institut*, the Court placed its examination solely within the parameters of the ‘protection of the rights of others’.<sup>712</sup> More specifically, the Austrian government sought to assert that the interference was, “particularly [aimed at protecting] *the right to respect for one’s religious feelings*.”<sup>713</sup>

In confirming that the interference pursued the legitimate aim of protecting the rights of others, the majority’s judgment in *Otto-Preminger-Institut* sought to employ a holistic interpretation of the Convention, according to which the ‘protection of the rights of others’ was understood with reference to its Article 9 jurisprudence. In this regard, of particular significance for the Court in *Otto-Preminger-Institut* was the seminal case of *Kokkinakis v. Greece*, according to which expression may, under certain circumstances, be seen to undermine others’ Article 9 rights.<sup>714</sup> Thus, whilst religious adherents cannot be said to enjoy total immunity from criticism, the majority reasoned in *Otto-Preminger-Institut* that:

the *manner* in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right [to freedom of thought, conscience and belief] guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines.<sup>715</sup>

Moreover, the Court went on to assert that, “in extreme cases the effect of *particular methods* of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.”<sup>716</sup>

Thus, the Court surmised, since ‘provocative portrayals of religious veneration’ are capable of violating the rights of believers in respect of their religious feelings, by seeking to suppress expression deemed likely to cause ‘justified indignation’ amongst certain sections of Austrian society, the State authorities’ interference with the applicant’s Article 10 rights was, indeed, in the pursuance of the legitimate aim of ‘protecting the rights of others.’<sup>717</sup>

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<sup>711</sup> *Müller*, para. 30

<sup>712</sup> Interestingly, the Court eschewed the government’s suggestion that the interference was also aimed at preventing disorder, pointing out that the emphasis of the domestic proceedings had been on the protection of religious adherents from ‘justified indignation’ and not the wider social ramifications that may have ensued. See *Otto-Preminger-Institut*, *op cit*, paras. 46-8

<sup>713</sup> *Otto-Preminger-Institut*, *op cit*, para. 46 (emphasis added)

<sup>714</sup> *Kokkinakis v. Greece* (1993)

<sup>715</sup> *Otto-Preminger-Institut*, *op cit*, para. 47 (emphasis added)

<sup>716</sup> *Otto-Preminger-Institut*, *op cit*, para. 47 (emphasis added)

<sup>717</sup> *Otto-Preminger-Institut*, *op cit*, paras. 47-8

### *Necessity in a democratic society*

After establishing that there had been an interference with the applicant's Article 10 rights and that such interference was prescribed by law and pursued a legitimate interest, the European Court of Human Rights next set out the general principles informing its assessment of the necessity of the interference. As has become customary in its Article 10 jurisprudence, the *Handyside* mantra signalling, in addition to confirming the applicability of article 10 to even offensive expression's inclusion within Article 10, the significance of freedom of expression in terms of instilling the pluralism, tolerance and broadmindedness necessary for a democratic society was recited by the Court.<sup>718</sup> Given that the facts pertaining to *Otto-Preminger-Institut* afforded the Court with its first opportunity to develop its fledgling jurisprudence on specifically artistic expression since its explicit incorporation within Article 10 in *Müller* it is somewhat curious that the majority failed to reaffirm artistic expression's explicit location within the broader context of Article 10. In particular, no reference was made to the observation in *Müller* that artistic expression, "...affords the opportunity to take part in the public exchange of cultural, political and social information and ideas *of all kinds*."<sup>719</sup>

The failure to explicitly affirm artistic expression's location within Article 10 aside, the Court did develop upon the assertion, made in *Müller*, that the scope of the duties and responsibilities inherent in the exercise of one's Article 10 rights is dependent upon the context and the means employed.<sup>720</sup> In particular, the Grand Chamber in *Otto-Preminger-Institut* stipulated that there may legitimately be, in the context of religious beliefs:

an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.<sup>721</sup>

In light of its discussion pertaining the legitimacy of pursuing the aim of protecting the rights of others, vis-à-vis the *Kokkinakis* case, the Court went on to surmise that it may, therefore, be necessary in democratic society for the State to seek to suppress 'improper

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<sup>718</sup> *Otto-Preminger-Institut*, *op cit*, para. 49

<sup>719</sup> *Müller*, *op cit*, para. 27 (emphasis added)

<sup>720</sup> See *Müller*, *op cit*, para. 34

<sup>721</sup> *Otto-Preminger-Institut*, *op cit*, para. 49

attacks' on objects of religious veneration, provided that the interference was proportionate to the legitimate aim in question.<sup>722</sup>

On the question of the margin of appreciation, *Müller* was cited; it being said that, as with morals, there was no uniform, European conception concerning the significance of religion in society such that a 'certain' margin of appreciation was left to the State in determining both the existence and extent of the necessity of any interference required to protect the religious feelings of the faithful.<sup>723</sup> Significantly, the Court added that, "even within a single country such conceptions [as to the significance of religion in society] may vary."<sup>724</sup> The scope of European supervision was therefore again confirmed to vary depending on circumstances of the case. Nonetheless, given the purported 'importance of the freedoms in question' in *Otto-Preminger-Institut*, a 'strict' supervision was required, according to which the necessity of the interference needed to be 'convincingly established'.<sup>725</sup>

In applying these general principles to the specific question of the State's initial seizure of the film, the European Court of Human Rights concluded that there had not been a violation of Article 10. Informing the Court's rationale in addressing the question of the interference's necessity was its view that the facts of *Otto-Preminger-Institut* required the 'weighing up [of two] conflicting interests'.<sup>726</sup> In short, the right to express (and receive) controversial expression needed to be weighed against the right to 'proper respect' for others' freedom of religion, whilst simultaneously recognising the State's margin of appreciation.

The applicant attempted to distinguish the present case from that of *Müller* in which, it will be remembered, access to the gallery was free to the general public and no age restriction was in place. In this regard, the applicant argued that it had taken reasonable precautions to avoid causing unwitting offence such as to render the film's initial seizure unnecessary. For instance, in addition to having an age restriction in place prohibiting those under the age of seventeen from viewing the showing, an admission fee was required to be paid in order to watch the film. Moreover, it was asserted that since the film had been widely publicised and given that the cinema's clientele generally had 'an interest in progressive

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<sup>722</sup> *Otto-Preminger-Institut*, *op cit*, para. 49

<sup>723</sup> *Otto-Preminger-Institut*, *op cit*, para. 50 (citing *Müller*, para. 35)

<sup>724</sup> *Otto-Preminger-Institut*, *op cit*, para. 50

<sup>725</sup> *Otto-Preminger-Institut*, *op cit*, para. 50 (citing *Informationsverein Lentia and Others v. Austria* (1993) para. 35)

<sup>726</sup> *Otto-Preminger-Institut*, *op cit*, para. 55

culture', there was little threat of anyone being offended by the film's contents against their wishes.<sup>727</sup>

Notwithstanding the implementation of such measures, the majority judgment of Court took a contrary view to that advanced by the applicant, maintaining instead that the expression was 'sufficiently public', on account of the publicity that the film had received, for it to have caused offence.<sup>728</sup> Seeming to inform the Court's rationale in this regard was its recognition that the Tyrol area of Austria in which the film was due to be shown contained a significant population of Roman Catholics. That some 87% of the local population were of Roman Catholic faith thus led the Court to surmise that there was, indeed, a 'pressing social need for the preservation of religious peace'.

In seeking to prevent 'unwarranted and offensive' attacks on religious beliefs and thereby preserve religious peace in the Tyrol region of Austria, the Court confirmed that the Austrian authorities had not exceeded their margin of appreciation.<sup>729</sup> Of particular significance in reaching this decision was the Court's recognition that it is for the national authorities, in the first instance, to assess the necessity of any required measures in light of local conditions. Furthermore, the Court emphasised that sufficient consideration had been given to the freedom of (artistic) expression by the domestic courts. Thus, it was recognised that the national courts simply:

did not consider that [*Das Liebeskonzil*'s] merit as a work of art or its contribution to public debate in Austrian society outweighed those features which made it essentially offensive to the general public within their jurisdiction.<sup>730</sup>

In light of the State's margin of appreciation, therefore, the Court went on to assert that, in the majority's opinion, "the content of the film...cannot be said to be incapable of grounding the conclusions arrived at by the Austrian courts."<sup>731</sup> Through the application of a double-negative, the film's seizure and, under the same reasoning, forfeiture were deemed necessary within a democratic society for the purposes of Article 10(2) and thus no violation was found.

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<sup>727</sup> *Otto-Preminger-Institut, op cit*, para. 53

<sup>728</sup> *Otto-Preminger-Institut, op cit*, para. 54

<sup>729</sup> *Otto-Preminger-Institut, op cit*, para. 56

<sup>730</sup> *Otto-Preminger-Institut, op cit*, para. 56

<sup>731</sup> *Otto-Preminger-Institut, op cit*, para. 56



## OVERVIEW OF THE FACTS

Decided, on the same day that representatives of the UK government visited the Strasbourg court to insist that member States be given more reign in the management of their own affairs,<sup>733</sup> the case of *Wingrove v. UK* afforded the Court with another opportunity to develop its jurisprudence on the relationship between controversial artworks, gratuitous offence and the rights of others within the meaning of Article 10(2).

The alleged violation of Article 10 in the case of *Wingrove* centred around the British Board of Film Classification's (BBFC) refusal to certify Mr Wingrove's eighteen minute film *Visions of Ecstasy*, a prerequisite for the legal sale and distribution of films in the United Kingdom.<sup>734</sup> The film, although containing no dialogue, was said to have been inspired by the historical figure of St Teresa of Avila, a sixteenth century Carmelite nun who experienced 'powerful ecstatic visions of Jesus Christ'.<sup>735</sup> The film itself contains nudity and sexual scenes, including a lesbian encounter between the actor playing the part of St Teresa and another woman (said to be St Teresa's psyche) as well as with the crucified form of Christ, who appears to be suggestively aroused by the experience.<sup>736</sup>

In refusing to award the film with a classification certificate, the BBFC was mindful of its duty to avoid classifying films whose content fell within the remit of the Obscene Publications Acts of 1959 and 1964 in addition to those films that contravene any other provision of the criminal law.<sup>737</sup> As such, the offence of blasphemy, defined by the House of Lords in the then recent domestic case of *R v. Lemon* as, "any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible" was considered of particular relevance to the BBFC's considerations.<sup>738</sup> Accordingly, whilst it was accepted that questions of religious ecstasy and sexual passion may be matters of "legitimate concern

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<sup>732</sup> *Wingrove v. UK* 24 EHRR 1 (1996)

<sup>733</sup> Kearns (n 16) at 63

<sup>734</sup> *Wingrove, op cit*, paras. 23 and 32

<sup>735</sup> *Wingrove, op cit*, para. 8

<sup>736</sup> See *Wingrove, op cit*, para. 9 for greater detail of the film's contents.

<sup>737</sup> *Wingrove, op cit*, para. 13

<sup>738</sup> *Wingrove, op cit*, para. 13 The purportedly blasphemous poem that prompted the case of *R v. Lemon* was subsequently the subject of admissibility proceedings before the European Commission of Human Rights *Gay News Ltd. and Lemon v. United Kingdom* where the applicants' claim, under Article 10, was declared inadmissible.

to the artist,” the determinative factor to be considered was, according to the BBFC, the *manner* (described as the ‘tone, style and spirit’) in which such subjects are addressed, such that it would be deemed blasphemous if, “the manner of its presentation is bound to give rise to outrage at the unacceptable treatment of a sacred subject.”<sup>739</sup> There was therefore deemed to be sufficient grounds to suppose that the film would be found blasphemous at trial because there was, “no attempt to explore the meaning of the imagery [in which the sole focus of St Teresa’s erotic desires was the figure of Christ] beyond engaging the viewer in an erotic experience.”<sup>740</sup> Accordingly, it was not the sexual imagery *per se* that led the BBFC to refuse to grant the film with certification but, rather, that the sexual imagery pertained to the figure of Christ.<sup>741</sup>

Moreover, in upholding the BBFC’s original decision, the Video Appeals Committee (VAC) concluded that the film did not, as the applicant sought to assert, explore St Teresa’s inherent struggles with her visions but, rather, “exploited a devotion to Christ in purely carnal terms.”<sup>742</sup> Informing the VAC’s conclusion was its assessment of the way in which the applicant depicted the subject matter. Much was made, therefore, of the applicant having exceeded his artistic licence: it being said, for instance, that there was an age discrepancy between the actual, historical figure of St Teresa and the actor depicting her and that there was no historical basis for the interpretation of her ecstasy taking the form of being in bodily contact with Christ.<sup>743</sup>

## DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS

### *Prescribed by law*

Since there was no disputing that the BBFC’s refusal to grant a certificate for the distribution of *Visions of Ecstasy* amounted to an interference with Mr Wingrove’s right to freedom of expression under Article 10,<sup>744</sup> the first substantive issue to be addressed by the Court was, again, whether the interference was prescribed by law. In particular, the applicant sought to argue that the offence of blasphemy was too uncertain, and thereby afforded him with insufficient foresight as to whether or not his film would subsequently

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<sup>739</sup> *Wingrove, op cit*, para. 13

<sup>740</sup> *Wingrove*, para. 13

<sup>741</sup> *Wingrove*, para. 13

<sup>742</sup> *Wingrove*, para. 19

<sup>743</sup> *Wingrove*, para. 19

<sup>744</sup> *Wingrove*, para. 36

be deemed blasphemous.<sup>745</sup> However, in common with its assessment of obscenity laws in the case of *Müller* as well as that offered by the Commission in *Gay News*, the Court recalled that, “the offence of blasphemy cannot by its very nature lend itself to precise legal definition.”<sup>746</sup> Given that there was no uncertainty regarding the definition of blasphemy as provided in the case of *R v. Lemon per se*, the Court was satisfied that the offence of blasphemy was prescribed by law to a sufficient degree and that, in light of the content of Mr Wingrove’s film, the applicant ought therefore to have been reasonably aware of the possibility that the film might be construed as blasphemous.<sup>747</sup>

### ***Legitimate aim***

The aim of the interference, according to the government’s submission, was to:

protect against the treatment of a religious subject in such a manner as to...outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented.<sup>748</sup>

That protecting religious believers from offence was indeed considered to be a legitimate aim within the meaning of Article 10(2) was, in line with *Müller* and *Otto-Preminger-Institut*, confirmed with the Court’s assertion that such an aim ‘undoubtedly corresponds to...the protection of ‘the rights of others’.<sup>749</sup> Moreover, protecting the rights of others, in this regard, was said to be ‘fully consonant with the aim of the protections afforded by Article 9.’<sup>750</sup>

### ***Necessity in a democratic society***

In line with the Court’s approach to the categorisation of expression outlined in Chapter Three of this thesis, and in contrast to the earlier cases of *Müller* and *Otto-Preminger-Institut*, the Court in *Wingrove* referred explicitly to the notion that, “there is little scope under Article 10(2) for restrictions on political speech or on debate of questions of public interest,” before going on to explain that a wider margin of appreciation is available to

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<sup>745</sup> *Wingrove, op cit*, para. 37

<sup>746</sup> *Wingrove, op cit*, para. 42

<sup>747</sup> *Wingrove, op cit*, para. 43

<sup>748</sup> *Wingrove, op cit*, para. 48

<sup>749</sup> *Wingrove, op cit*, para. 48

<sup>750</sup> *Wingrove, op cit*, para. 48

national authorities on matters liable to offend intimate personal convictions in the realm of morals and religion.<sup>751</sup> The Court's subsequent assessment of the interference with the applicant's right to freedom of expression therefore hinged on the balancing of, on the one hand, the film's perceived capacity to contribute to a debate on questions of public interest and, on the other, its potential to cause offence to religious sensitivities.

Accordingly, after recognising that there exists a duty within Article 10 to avoid causing gratuitous offence, underpinning much of the Court's reasoning leading to the finding that there had been no violation of Article 10 was its (necessarily limited) assessment of the manner in which the expression was made. Whilst the majority's judgment did not make the further assertion, as it had in *Otto-Preminger-Institut*, that gratuitously offensive expression is *inherently* incapable of contributing to public discourse, artistic expression was similarly, and indeed further, undermined by the Court's acceptance and reiteration, on account of the wide margin of appreciation, of the rationale employed by the BBFC in refusing to grant a certificate in the initial instance. Thus, a crucial factor in, firstly, the BBFC and VAC's grounds for refusing a certificate for the film's release and, secondly, the Court's finding that there had been no violation of Article 10 in so doing, was that it was the *manner* in which the subject matter was presented and not the subject matter *per se* that was at issue.<sup>752</sup> Again, in light of the limited scrutiny afforded to the European Court of Human Rights stemming from the widening of the margin of appreciation, no specific account could be given to the notion that, for instance, the manner in which the expression was made is inherently bound up in the form that the expression was made.

That it was the *manner* in which Mr Wingrove had chosen to pursue his chosen subject matter that was of crucial significance in reaching the conclusion that there had been no violation of Article 10 again may be considered to be a further demonstration of the inherently discriminated position enjoyed by artistic expression under Article 10. Again, without recognising or engaging with the unique qualities pertaining to artistic expression and their relationship within the freedom of expression discourse more generally (and a seeming dependence upon a need for the expression's perceived ability to contribute, in a traditional 'politically' minded sense, to public discourse) artistic expression is implicitly, and somewhat inevitably, undermined.

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<sup>751</sup> *Wingrove, op cit*, para. 58

<sup>752</sup> For the BBFC and the Video Appeals Committee's rationale see *Wingrove, op cit*, paras. 13 and 17 and, for the Court's assessment, see para. 60

## *I.A. v. Turkey (2005)*<sup>753</sup>

### OVERVIEW OF THE FACTS

The case of *I. A. v. Turkey* concerned the publication of the book *Yasak Tümceler (The Forbidden Phrases)* in which the author's philosophical and theological views were presented, according to the European Court of Human Rights, in a 'novelistic style'.<sup>754</sup> In initiating criminal proceedings against the applicant publisher, the public prosecutor cited the evidence provided by an academic theologian who considered that the book's theological passages, "imprisons readers within the limits of [the author's] own views, which are devoid of all academic rigour" such that the book was deemed blasphemous within the terms of the relevant section of the Turkish Criminal Code.<sup>755</sup>

Of particular relevance, then, in the subsequent criminal proceedings that were brought against the applicant publisher was the following passage:

Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. [...] God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.<sup>756</sup>

That the book was indeed blasphemous, contrary to the Turkish Criminal Code's prohibition of the vilification or insulting of religion and religious beliefs, was thus confirmed in the domestic courts and a fine imposed on the applicant.<sup>757</sup>

### DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS

Given the European Court of Human Rights' preceding case law pertaining to *Müller, Otto-Preminger-Institut* and *Wingrove* it is perhaps unsurprising that the Court held there to be no violation of Article 10. Following from its previous case law, by widening the margin

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<sup>753</sup> 45 EHRR 703 (2005)

<sup>754</sup> *I.A. v. Turkey*, *op cit*, para. 5

<sup>755</sup> *I.A v. Turkey*, *op cit*, paras. 6-7

<sup>756</sup> *I.A v. Turkey*, *op cit*, para. 13

<sup>757</sup> *I.A v. Turkey*, *op cit*, paras. 13-16

of appreciation on account of the religious aspect of the book and recognising the duty incumbent upon the exercise of the right to freedom of expression to avoid conveying gratuitously offensive expression, the European Court of Human Rights accepted that the domestic courts had acted within the margin of appreciation bestowed upon it in awarding the applicant with a fine. Accordingly, notwithstanding the applicant's assertion that the book, by taking the form of a novel, should be considered in terms of its literary qualities, the European Court of Human Rights accepted that the expression at issue in *I.A. v. Turkey* went beyond the merely shocking or offensive and was, as such, an 'abusive attack on the Prophet of Islam'.<sup>758</sup> Again, the application of the margin of appreciation necessarily worked to paralyse any independent assessment, on the part of the European Court of Human Rights, as to the specific qualities pertaining to artistic expression and its relationship with freedom of expression more generally.

Whilst the conclusion reached in *I.A. v. Turkey* is not surprising, it is curious to note that the case was decided by a slim majority of four votes to three. When compared to the overwhelming majorities enjoyed in the judgments of *Müller, Otto-Preminger-Institut* and *Wingrove* such a shift is perhaps indicative of the beginnings of a paradigmatic change in the Court's jurisprudence: the extent to which such a shift *is* currently underfoot will, accordingly, be addressed in the overview of the Court's later case law to follow. Crucially, there is a degree of recognition, within the reasoning employed in the joint dissenting opinion in *I.A. v. Turkey*, of the nature of artistic expression and its relationship to freedom of expression. Thus, in noting the limited number of copies of the book that had been produced, the dissenting opinion asserted that impact that the book's distribution would have would likely be minimal, the dissenting opinion was therefore critical of the national authority's approach, in which they confined themselves solely to an abstract assessment of the impugned statements.<sup>759</sup> Accordingly, according to the dissenting opinion, the promotion of conformism in the European Court of Human Rights' earlier triumvirate case law of *Müller, Otto-Preminger-Institut* and *Wingrove*, ought to be revisited.<sup>760</sup>

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<sup>758</sup> *I.A. v. Turkey*, *op cit*, para. 29

<sup>759</sup> *I.A. v. Turkey*, *op cit*, Joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert, para. 2

<sup>760</sup> *I.A. v. Turkey*, *op cit*, Joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert, para. 8

#### 4.3.5 Protecting the ‘rights of others’ as a basis for limiting the right to freedom of artistic expression: Defamation

In addition to public morality, and its relationship with the rights of others, another crucial strand of the ‘rights of others’ limitation clause of Article 10 (2) relates to the treatment of artistic expression in two cases in which defamation was specifically raised as a ground for restricting the expression. As such, the cases of *Vereinigung Bildender Künstler v. Austria*<sup>761</sup> and *Lindon, Otchakovsky-Laurens and July v. France*<sup>762</sup> offer an invaluable insight in to the contrasting schools of thought within the Court as to the treatment of artistic expression more generally (by way of contrast with the public morality cases) as well as the relationship between art and defamation more specifically. Not only are the cases factually similar, in that they both concern the alleged infringement of the personality rights of politicians, but, with the cases decided only months apart in 2007, a considerable number of personnel were present on the bench on each occasion. That the outcome of the cases differed – with the finding of a violation of Article 10 found in the earlier case of *Vereinigung Bildender Künstler v. Austria* contrasting with the non-violation held, by a majority in the Grand Chamber, in *Lindon, Otchakovsky-Laurens and July v. France* – is therefore, at least on the surface, peculiar and worthy of further investigation.

##### *Vereinigung Bildender Künstler v. Austria* (2007)<sup>763</sup>

In *Vereinigung Bildender Künstler v. Austria* a slender majority of four to three in the First Section of the Court held that the injunction preventing the further display of the artist Otto Muhl’s *Apocalypse* constituted a violation of freedom of expression. The painting in question had featured, as part of the applicant’s centenary celebrations, in an exhibition entitled, somewhat ironically, *The Century of Artistic Expression* and depicted, in a collage style, a number of public figures engaging in sexual acts; their faces being portrayed using blown-up photos obtained from newspapers, whilst the adjoining, naked, bodies were painted by Otto Muhl himself.<sup>764</sup> The exhibition was held on the applicant’s own premises and, in contrast with the earlier case of *Müller*, entrance was subject to an admission charge.<sup>765</sup>

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<sup>761</sup> *Case of Vereinigung Bildender Künstler v. Austria* (2007) (HUDOC)

<sup>762</sup> *Case of Lindon, Otchakovsky-Laurens and July v. France* (2007) (HUDOC)

<sup>763</sup> *Case of Vereinigung Bildender Künstler v. Austria* (2007) (HUDOC)

<sup>764</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, para. 8

<sup>765</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, paras. 7-9

One of those depicted in the scene, Mr Meischberger (former general secretary of the Austrian Freedom Party and who was, at the time, a member of the National Assembly) sought an injunction preventing the applicant from exhibiting and the publishing the painting, which showed him, “gripping the ejaculating penis of [the former head of the Austrian Freedom Party] whilst at the same time being touched by two other [Austrian Freedom Party] politicians and ejaculating on Mother Teresa.”<sup>766</sup> In particular, Mr Meischberger claimed that the painting, “debased him and his political activities and made statements as to his allegedly loose sexual life,” an argument that he maintained despite his depiction being partially covered by red paint, following the painting’s vandalism towards the end of the exhibition’s run.<sup>767</sup>

The reasoning underlying the Court’s finding that there had been a violation of Article 10 in *Vereinigung Bildender Künstler v. Austria* may be considered as a further example suggestive of a trend in the Court’s increasing, if gradual, awareness of the specific qualities of artistic works and of artistic expression’s relationship to, and location within, the freedom of expression discourse more generally the emergence of which may be traced back to the dissenting opinion in *I.A. v. Turkey*. In particular, in noting the form in which the expression in Otto Muhl’s *Apocalypse* had taken, the majority in *Vereinigung Bildender Künstler v. Austria* stipulated that there had never been any suggestion to the contrary that the work “obviously did not aim to reflect or even to suggest reality.”<sup>768</sup> As such, the Court, in accepting Muhl’s work to be a piece of satire, went on to assert that, “satire is a form of artistic expression and social commentary and, by its *inherent features* of exaggeration and distortion of reality, naturally aims to provoke and agitate.”<sup>769</sup>

It would be understandable, therefore, to consider the Court’s judgment in *Vereinigung Bildender Künstler v. Austria* as a bastion for freedom of artistic expression. By affirming that the imposition of an injunction in the present case violated Article 10 of the ECHR the Court, at first glance at least, appeared to be upholding the right to produce and disseminate controversial art, thus finally delivering on the oft-quoted but little acted upon maxim that first entered the vocabulary of human rights law pertaining to freedom of expression some thirty years previously: namely that Article 10 applies even to shocking and offensive

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<sup>766</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, paras. 8 and 13

<sup>767</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, paras. 11-13

<sup>768</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, para. 33

<sup>769</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, para. 33 (emphasis added)



expression. Moreover, given the religious connotations prevailing throughout much of *Apocalypse* (Mr Meischberger was, after all, depicted as engaging in a sexual act with Mother Teresa and, elsewhere in the scene, other religious leaders featured in similarly explicit activities) one may see certain similarities with *Wingrove* and, to a slightly lesser extent, *Otto-Preminger*. That a violation of Article 10 was found in *Vereinigung Bildender Künstler v. Austria* and not the earlier cases of *Wingrove* and *Otto-Preminger* – cases where, it will be recalled, the Court’s recognition of the ‘gratuitous’ nature of the expression necessarily, it was supposed, rendered the expression as being incapable of contributing to public discourse – may, for the optimist at least, offer some suggestion of the development of the kernels of a seismic shift in the Court’s Article 10 jurisprudence. Rather than looking at an artwork superficially and one-dimensionally – with the binary effect of equating gratuitous expression with, what is in practice, through the blurring of the coverage-protection distinction, effectively non-protection – a small, but growing, case law is emerging, indicating a more contextual approach in which qualities specific to the artistic endeavour are recognised and applied to the Court’s reasoning such that one may see the beginnings for a greater scope in the protection for artistic expression.

Indeed, that there were certain facial similarities between the artworks in *Vereinigung Bildender Künstler v. Austria* and the earlier ‘public morality’ cases concerning artistic expression is to a certain extent confirmed by considering the strategy adopted by the Austrian government’s legal counsel. In attempting to dismiss the applicant’s claim as inadmissible, the government first submitted that there had in fact been no interference with the applicant’s right to freedom of expression on the grounds that, “Article 10 [does] not protect artistic freedom as such but only provide[s] protection to artists who intended to contribute through their work to a public discussion of political or cultural matters.”<sup>770</sup> By implicitly mirroring the reasoning underpinning the attributing of the label ‘gratuitous offence’ to the artworks in *Wingrove* and *Otto-Preminger*, the government went on to stipulate that the, “reproduction of public figures in ‘group sexual situations’ could [...] hardly be regarded as a statement of opinion contributing to a cultural or political debate.”<sup>771</sup> Similarly, in the alternative – supposing that the Court accepted that there had been an interference – the government sought to maintain that the interference, by way of injunction, was nevertheless a proportionate reaction to the situation given the impact on

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<sup>770</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, para. 22

<sup>771</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, para. 22

Mr Meischberger's personality rights when counterbalanced against the artwork's lack of contribution to public discussion.<sup>772</sup>

In finding there to have been a violation of Article 10, the majority of the Court dismissed both strands of the government's argument. Yet the line of reasoning employed in reaching that decision cannot be said to promote the protection of artistic expression to the extent that one might initially presume. Whilst the majority, in essence, rejected the government's submission that the particular artwork in question did not contribute to a public discussion and, in doing so, referred to the specific artistic/satirical qualities of Otto Muhl's work – such as distortion and exaggeration – the net result of the Court's reasoning may be seen as an attempt to subtly locate the issue within the parameters of 'political expression'. Thus, much was made of the fact that Mr Meischberger was a politician, and a lesser well-known one at that<sup>773</sup>, and thus ought to display a greater degree of tolerance towards criticism in line with the well-established *Lingens* principles concerning the strict protection of political expression. As such, and in light of the fact that Otto Muhl had himself been the subject of criticism from some of politicians featured in *Apocalypse*, the artwork in question was considered as "some sort of counter-attack."<sup>774</sup> That the work featured politicians in addition to the initial complainant himself being a politician may be considered as significant in giving a majority of the judges of the Court the confidence to recognise the artwork's contribution to public discourse and society/culture more generally, in turn leading to the conclusion that the granting of an injunction was disproportionate and thus in violation of Article 10.

Herein lies something of a paradox. It is submitted that on slightly different facts a rather different outcome would likely have occurred. In finding that *Apocalypse* did contribute to a public discussion – such that any interference with it had to be assessed with 'particular care' and thus paving the way for the finding of a violation – the Court rejected the government's argument that, in addition to consideration of the 'rights of others', the injunction was justified on the grounds that it also sought to protect public morality. The government's submission was rejected on the basis that throughout the domestic proceedings the case against the applicant was based entirely on copyright legislation, which made no reference to the protection of public morality.<sup>775</sup> However, it is certainly

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<sup>772</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, para. 23

<sup>773</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, para. 35

<sup>774</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, para. 34

<sup>775</sup> *Vereinigung Bildender Künstler v. Austria*, *op cit*, paras. 28-31

not inconceivable to imagine a scenario in which, say, a practicing Catholic who, upon seeing the depiction of Mother Teresa in *Apocalypse*, was grossly offended to the extent that he complains to the authorities who subsequently seize the artwork on the grounds that it ‘disparaged religious doctrines’. It would be difficult, under such circumstances, for the Court to convincingly distinguish between this, hypothetical, *Vereinigung Bildender Künstler v. Austria* case and that of *Wingrove* or *Otto-Preminger* such that it would be very likely, it is suggested, that the Court would find no violation of Article 10. Yet, such a position is clearly unsatisfactory, if not plainly undesirable, for the simple reason that the very same artwork could be subject to differing levels of protection, depending solely on what limitation clause under Article 10(2) the government in question sought to pursue. Moreover, as the *Apocalypse* paradox highlights, one may further infer that the Court is concerned less with the specific artistic qualities of a work *per se*, or indeed the artistic endeavour in general, than it is with its own confidence in recognising the potential contribution of a given work of art to public discourse. In particular, the level of confidence can be seen as heightened by an ability to ‘understand’ the artwork in a conventional, political discourse. After all, the artist’s claim in *Vereinigung Bildender Künstler v. Austria* to be exploring the relationship between sexuality and power would be seen as holding greater sway when applied to the politician than when applied to the religious actor, thus exemplifying the failure to fully acknowledge the artistic qualities.

***Lindon, Otchakovsky-Laurens and July v. France (2007)***<sup>776</sup>

In turning our attention to the case of *Lindon, Otchakovsky-Laurens and July v. France*, one may see a distinct contrast in the attitude of the Court towards the limitation of artistic expression in respect of protecting the rights of others. Published in 1998, the novel *Jean-Marie Le Pen on Trial* tells the story of a fictional Front National militant named Ronald Blistier who is convicted for killing a North African man in what he admits was a racist crime. Although a work of fiction, *Jean-Marie Le Pen On Trial* drew heavily on the actual murders of two individuals of African descent, by militants of the right wing Front National. In reality, the murderers of the two incidents were duly convicted in trials described by Le Pen as “a provocation and a put-up job through which the party's enemies sought to harm it.”<sup>777</sup>

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<sup>776</sup> *Lindon, Otchakovsky-Laurens and July v. France (2007)* (HUDOC)

<sup>777</sup> *Lindon, Otchakovsky-Laurens and July v. France, op cit*, para. 11

The plot of the novel centres on the moral dilemmas facing the accused's lawyer – a left wing Jewish homosexual – who seeks to find some way to hold the Chairman of the Front National, Mr Le Pen, to account. Near the beginning of the novel the thought is pondered, “isn't the chairman of the Front National responsible for the murder committed by one of his teenage militants inflamed by his rhetoric?”<sup>778</sup> In response, Le Pen and the Front National brought proceedings before the domestic courts for public defamation against a private individual, specifically with regard to six passages within the novel, amounting to no more than three per cent of the book taken as a whole.<sup>779</sup> Moreover, of the six passages that were the subject of the original complaint, only three were ultimately found to be defamatory. Thus, the passages deemed by the domestic courts to be defamatory read as follows:

.... an effective way to fight Le Pen is to call for him to be put in the dock and show that he isn't the leader of a political party but the chief of a gang of killers – after all, people would have voted for Al Capone too.<sup>780</sup>;

Read the papers, listen to the radio and television, every statement by Jean-Marie Le Pen is bedecked – or rather bespotted and bespattered, with racist overtones that are barely concealed at best. Each of his words is a veil for others and from behind each of his assertions looms the spectre of the worst abominations of the history of mankind. Everyone knows it, everyone says it. What Ronald Blistier did was precisely what Jean-Marie Le Pen advocates. Perhaps not explicitly – he tries to abide by the law, even though he does not always manage to do so. But when you consider the situations in which he speaks, the innuendos he makes and the figures he supports, there can be no doubt.<sup>781</sup>;

How can Jean-Marie Le Pen be allowed to play the victim after Ronald Blistier's suicide? Isn't the Front National chairman a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood, like the blood of his enemies? Why does Le Pen accuse democrats of the alleged murder of Ronald Blistier? Because he isn't afraid of lies – because engaging in defamation against his opponents always appears useful for him, of course, but it is also quite simply a means to deflect suspicion; he's the one who shouts the loudest in the hope that his ranting will drown out the accusations against himself.<sup>782</sup>

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<sup>778</sup> Lindon, *Otchakovsky-Laurens and July v. France*, *op cit*, para. 11

<sup>779</sup> The offending passages were found within 5 pages of the book's total of 138 pages. The offending passages are likely therefore to be an even lower percentage.

<sup>780</sup> Lindon, *Otchakovsky-Laurens and July v. France*, *op cit*, para. 50 (The passage contained a view attributed by the author to anti-racist demonstrators who had gathered outside the courts.)

<sup>781</sup> Lindon, *Otchakovsky-Laurens and July v. France*, *op cit*, para. 50 (The passage refers to the lawyer's address before the court)

<sup>782</sup> Lindon, *Otchakovsky-Laurens and July v. France*, *op cit*, para. 50 (A statement by the defendant's lawyer on television after his client's suicide in prison)

Perhaps the greatest distinction that can be made between *Lindon, Otchakovsky-Laurens and July v. France* and *Vereinigung Bildender Künstler v. Austria*, other than the outcome itself, is the relationship between the artworks in question and perceived reality. As we shall see below, the reason for these differing results lies, in part, on the majority's failure, whether intentional or otherwise, to attribute sufficient weight to specific artistic qualities inherent in the work. In particular, and perhaps somewhat counter-intuitively, this failure of the Grand Chamber in *Lindon, Otchakovsky-Laurens and July v. France* may be traced to its setting out a narrow margin of appreciation. By recalling that there is, "little scope under Article 10(2) of the Convention for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance [...] – or in matters of public interest [...]"<sup>783</sup> there was clearly a more explicit attempt to locate the present case within the 'political expression' paradigm than was the case in *Vereinigung Bildender Künstler*.<sup>784</sup> That the subject matter of the novel was based on the semi-factual events surrounding the trial of a Front National militant was evidence enough for the Court that, "[t]he work therefore unquestionably relates to a debate on a matter of general concern and constitutes political and militant expression, hence this is a case where a high level of protection of the right to freedom of expression is required under Article 10."<sup>785</sup>

Nevertheless, the majority of the Grand Chamber did give some credence to the medium through which the expression was made, albeit not with to the same extent as the First Section had in *Vereinigung Bildender Künstler*. In particular it was noted that:

A novel is a form of artistic expression, which falls within the scope of Article 10 in that it affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create or distribute a work, for example of a literary nature, contribute to the exchange of ideas and opinions which is essential for a democratic society.<sup>786</sup>

However, whilst the Court went on to accept the 'limited audience' argument pertaining to the limited impact artistic expression as a form of expression generally is considered to have, as developed through cases like *Alinak*, to be considered below, there is a distinct

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<sup>783</sup> *Lindon, Otchakovsky-Laurens and July v. France*, *op cit*, para. 46 (citations removed)

<sup>784</sup> Though, as I have attempted to argue above, there remained, in the case of *Vereinigung Bildender Künstler*, a sense that the philosophy of the 'political expression' paradigm underlined, albeit subtly, much of the majority's reasoning.

<sup>785</sup> *Lindon, Otchakovsky-Laurens and July v. France*, *op cit*, para. 48

<sup>786</sup> *Lindon, Otchakovsky-Laurens and July v. France*, *op cit*, para. 47

absence in the majority's reasoning of any reference to the relevant stylistic devices employed by literary writers. For instance, it will be recalled that in *Vereinigung Bildender Künstler* the Court recognised that distortion and exaggeration played an integral part in the satirical nature of Otto Muhl's *Apocalypse* such that it was accepted as obvious that the painting did not, and did not even attempt to, explain or reflect reality – at least not in the literal or surface sense. By way of contrast, in *Lindon*, the Court's approval of the domestic courts' finding that passages in which Mr le Pen is, for example, described as "the chief of a gang of killers" or "a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood" were defamatory contained no reference to artistic qualities that may have been of relevance given the medium in question. For instance, it would not be unreasonable to assume that, as part of the author's artistic endeavour, he had employed such qualities as hyperbole ('chief of a gang of killers') or metaphor ('vampire').

Whilst it is accepted that such qualities alone might not preclude a finding of no violation – the Court has, after all, stipulated on several occasions that everyone, in exercising their right to freedom of expression under Article 10 is subject to certain duties and responsibilities such that to nobody is automatically immune from the limitations espoused under Article 10(2) – there remains a degree of inconsistency in the manner in which the Court approaches expression that it readily admits is artistic in its nature.

Returning briefly to the speculative opening section of the present paper – in which it was tentatively suggested that an opportunity to afford greater protection to artistic expression may have been missed during the drafting process of Article 10 – one may argue that, had artistic expression been explicitly mentioned, a greater impetus would have been instilled in the Court's reasoning in so far as the taking in to account of the specific qualities of art within the freedom of expression paradigm more generally. As it stands, without the express provision relating to art, Article 10, in its generality, may be considered as affording too wide a scope in the manner in which the Court may approach the issue of artistic expression in any given instance. For instance, despite the finding of a violation in *Vereinigung Bildender Künstler*, the manner in which the Court reached the decision could, it is suggested, have been improved upon, had express reference to art been made within the rubric of Article 10. Although, greater weight was, admittedly, given to the artistic qualities present in the work in *Vereinigung Bildender Künstler* than in *Lindon*, it has been suggested that the underlying rationale employed by the Court was influenced by a rather traditional and 'political' (in the sense of argument/counter-argument) understanding of

how *Apocalypse* was considered to contribute to public discourse so as to subtly counteract any consideration of specific artistic qualities. In short, it is suggested that it was not the artwork in and of itself that was being protected in *Vereinigung Bildender Künstler* (as evinced by the hypothetical case concerning a Catholic complainant) but, rather, the more abstract notion of enabling a contribution to public discourse – a finding that was only capable of being achieved owing to the case’s specific circumstances and subsequent application of a quasi-political expression approach to the matter at hand.

Similarly, in *Lindon*, by locating the expression within the context of the political expression paradigm – owing to the surface, or literal, subject matter of the text – any assessment of the artistic qualities of the work were, perhaps necessarily, overlooked. In particular, as a direct consequence of the recognition of *Jean-Marie Le Pen On Trial* as falling within the ambit of political expression, the Court relied heavily on its existing case law concerning the distinction made by the Court in *Lingens* between, on the one hand, statements of fact and, on the other, value-judgments. In that case the Austrian courts found that the accusations made by Mr Lingens in a political magazine – namely that the plaintiff question was “immoral” and “undignified” in addition to describing comments made by the plaintiff as demonstrating “the basest opportunism” – were criminally defamatory.<sup>787</sup> Subsequently, Mr Lingens was convicted of criminal defamation, essentially on the grounds that he had failed to establish the veracity of his statements.<sup>788</sup>

In unanimously finding that Mr Lingens’s conviction amounted to a violation of Article 10, the Court asserted that a distinction needs to be made between facts and value-judgments for the seemingly simple reason that, “[t]he existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof.”<sup>789</sup> Moreover, the Court proceeded to stipulate that the essentially illogical requirement under the Austrian Criminal Code, to establish the truth of value-judgments, amounted to an infringement of freedom of thought which in turn is a fundamental part of freedom of expression. Thus, the Court seemed to place a great deal of significance on the fact that assertions of value or opinion, though based on some particular set of facts (for instance, the presence of former Nazis in prominent political positions in Austria) but are, nevertheless, in and of themselves not susceptible to proof in the conventional sense, are still to be given considerable protection.

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<sup>787</sup> *Case of Lingens v. Austria* (1986) (HUDOC), paras. 9-19

<sup>788</sup> *Lingens, op cit*, para. 46

<sup>789</sup> *Lingens, op cit*, para. 46

To rule otherwise would be to deprive the public of the opportunity of “discovering and forming an opinion of the ideas and attitudes of political leaders.”<sup>790</sup>

Transferring the fact-value dichotomy to the case of *Lindon*, a failure to appreciate any specific artistic qualities of the novel in question would clearly tend to skew the subsequent reasoning process. The problem is exacerbated in *Lindon* by the inconsistency with which the Court identifies the ‘voice’ with which the defamatory statements were made. As the dissenting judges point out, it is unclear from the domestic courts’ rationale why certain statements (for instance, “they’ll feel morally entitled to beat you up – to come after you, ten against one, with metal bars, truncheons and steel-capped boots...Nobody leaves the Front National with impunity”) were *not* found to be defamatory on the basis that the author was considered to have sufficiently distanced himself from them whilst, conversely, other statements were deemed to be sufficiently close to the author to amount to defamation. Indeed, the applicants had argued before the Court that such an approach seeking to ascertain the author’s thoughts from the words and actions of fictional characters, had the effect of, “imprison[ing]...literature in a set of rigid rules at odds with the freedom of artistic creation and expression.”<sup>791</sup> Again, without the ability (or indeed willingness) to set the particular expression within its proper context – ie. with reference to the particular qualities inherent of artworks – artistic expression is inevitably, perhaps even necessarily, put at a disadvantage. To put it another way, *Vereinigung Bildender Künstler* and *Lindon* demonstrate the difficulties in calibrating the different types of expression within the ‘catch-all’ rubric of Article 10: a process that would, arguably, have been less contrived had ‘art’ been expressly mentioned in Article 10’s text.

#### **4.3.6 Protecting national security, territorial integrity and the prevention of disorder and crime as bases for limiting the right to freedom of artistic expression**

Interestingly, the two cases to date in which the limitation of expression was grounded on either the protection of national security and territorial integrity and/or the prevention of disorder and crime are similar, not only in that both emanated from Turkey but, of more relevance for present purposes, both were found in favour of the applicant in producing a finding that Article 10 had, in fact, been violated. More interesting still is consideration of

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<sup>790</sup> *Lingens, op cit*, para. 42

<sup>791</sup> *Lindon, Otchakovsky-Laurens and July v. France, op cit*, para. 51



the differing approaches taken by the Court in each case in reaching that the same conclusion, an acknowledgment of which will show the facially paradoxical stance that has been adopted and developed through the Court's latter cases pertaining to artistic expression.

The first of these two cases, that of *Karatas*, concerned an anthology of poems penned by the applicant and entitled *The Song of a Rebellion – Dersim*.<sup>792</sup> Two months after the anthology was published, the public prosecutor initiated proceedings under terrorism laws against both Mr Karatas and his publisher, accusing them of having disseminated propaganda against the indivisibility of the State.<sup>793</sup> By a majority of twelve votes to five, the Grand Chamber of the Court held that the subsequent conviction and confiscation of the work amounted to a violation of Article 10, having concluded that the measures taken against the applicant were disproportionate in securing the sought after legitimate aims, such that they could not be considered to have been necessary in a democratic society.<sup>794</sup>

In light of the preceding discussion regarding the categorisation of expression and given the nature the nature of poetry in question, there exists an underlying tension in *Karatas* between two competing, though on the present facts, interrelated, widths of the margin of appreciation considered applicable to the national authorities in the discharge of their responsibilities under Article 10(2). Firstly, it was noted by the Court that the poems in question contained an, “obvious political dimension,” the result being that the Court’s case law to the effect that, “there is *little scope* under Article 10(2) of the Convention for restrictions on political speech or on debate on matters of public interest” was considered to be of relevance.<sup>795</sup> Secondly, whilst acknowledging that the limits of criticism levelled at the government is generally wider than that aimed at private citizens or even politicians, the Court went on to note that, “where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a *wider* margin of appreciation when examining the need for an interference with freedom of expression.”<sup>796</sup>

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<sup>792</sup> *Karatas v. Turkey* (1999) (HUDOC), para. 9

<sup>793</sup> *Karatas*, *op cit*, para. 10

<sup>794</sup> *Karatas*, *op cit*, para. 54

<sup>795</sup> *Karatas*, *op cit*, para. 50 (referring, in particular, to *Wingrove*, *op cit*, para. 58) (emphasis added)

<sup>796</sup> *Karatas*, *op cit*, para. 50 (emphasis added)

Whilst no direct reference was made to the expression being of an artistic nature in the setting out of the Court's initial margin of appreciation dichotomy noted above – thereby supporting the notion made previously that the categorisation and hierarchy of expression, as achieved through the variability of the margin of appreciation doctrine itself, is largely implicit with the Court being either unwilling or unaware of art's differential treatment unwilling – reference to the work's artistic nature was, perhaps somewhat counter-intuitively, relied upon in the subsequent process of justifying the narrowing of the margin of appreciation and thus leading to a finding of a violation of Article 10. In particular, this narrowing was achieved with a sense of negative reasoning in as much that it was the artistic nature of the expression that was considered to nullify the wide margin of appreciation enjoyed by the State with regard to the incitation of violence. Thus, the Court noted that the means through which the applicant had made his expression – ie. poetry – would necessarily, and 'by definition', reach only a small audience, thereby reducing any impact that the expression would have with regards to national security, public order or territorial integrity.

Additionally, in confirming that the anthology would likely have a limited impact in terms of national security etc, the majority, for the first time in a case concerning artistic expression, went on to make a glancing reference to, and consideration of, the implications of the artistic *qualities* of the expression, noting in particular that:

even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were *artistic in nature* and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.<sup>797</sup>

The implication that one may draw from the above quotation is that, despite the poetry's facial statements, that may well have been construed as calling for an uprising, the artistic nature of the expression in question requires one to look deeper, and further, 'beyond' the words and the phrases used in order to see the 'expression of deep distress' as opposed to a direct incitation to violence.

Indeed, the recognition and sympathetic application of the particular qualities and characteristics of art, was further developed, six years later, in the case of *Alinak*. The case concerned a novel, said to have incited hatred and hostility on the grounds of ethnic or

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<sup>797</sup> *Karatas, op cit*, para. 52

regional identity, such that the seizure of the novel was maintained by the government to have been necessary in order to prevent disorder and crime.<sup>798</sup> Again, as with *Karatas*, the tone of the novel which – though fiction, was said to have been based on real events, centring on the ill-treatment of a village at the hands of the State security forces – could be described as virulent, with the Court noting that, “[t]aken literally, certain passages might be construed as inciting readers to hatred, revolt and the use of violence.”<sup>799</sup> Yet, the Court went on to stipulate that recognition must be made of the fact that the expression in question took the form of a novel, a form of artistic expression.<sup>800</sup> Moreover, and in developing on the rationale employed in *Karatas*, the Court went on to cite the case of *De Haes and Gisels* which, though not concerning artistic expression, stipulated that Article 10 protects both the substance of the ideas and information that are expressed, as well as the form in which they are conveyed.<sup>801</sup>

Accordingly, and in line with *Karatas*, despite the statements contained within the novel which, taken literally, might be construed as a call for violence, the Court considered that the expression in question would necessarily reach a small audience on account of it being a novel, such that its potential impact would necessarily be reduced.<sup>802</sup> Furthermore, in addition to the limited impact the novel would likely make, and with a nod towards the *Karatas* judgment, reference was made to the artistic nature of the expression, rendering it more an ‘expression of deep distress in the face of tragic events...than a call to violence.’<sup>803</sup> The seizure of the novel was therefore considered to be disproportionate to the ends pursued, rendering a violation of Article 10.

As such, parallels may be drawn between, on the one hand, the cases of *Karatas* and *Alinak* and, on the other, the Millian conception – espoused through his ‘corn-dealer’ analogy<sup>804</sup> – that freedom of expression ought only be restricted when there exists a very real and present danger that harm will occur as a direct consequence of a given expression. Thus, reference was made to the qualities of artistic expression solely as a means of narrowing an otherwise wide margin of appreciation (ie. in relation to inciting violence) on the specific grounds that the artwork in question would, almost by definition, be of limited impact thereby

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<sup>798</sup> *Alinak v. Turkey* (2005) (HUDOC), paras. 11 and 27

<sup>799</sup> *Alinak, op cit*, para. 41

<sup>800</sup> *Alinak, op cit*, paras 41 and 43

<sup>801</sup> *Alinak, op cit*, para. 43: citing *De Haes v. Belgium* (1994) (HUDOC), see especially, para. 48

<sup>802</sup> *Alinak, op cit*, para. 45

<sup>803</sup> *Alinak, op cit*, para. 45

<sup>804</sup> For more detail see Chapter One *infra*.

offering an indication that the State's interference was disproportionate. In other words, from the Millian perspective, it could not be demonstrated that the (artistic) expression would directly induce the perceived harm. Such an approach must be commended for promoting a greater understanding and appreciation of the artistic endeavour and qualities perhaps peculiar to artistic works more generally, in as much as the Court has managed, to a certain extent, to 'distance' the expression from any *prima facie* harm. Accordingly, applying the same rationale to a future *Wingrove*-type case may yield an approach which is further conducive to the protection of artistic expression by 'distancing' the gratuity of the perceived offence from the supposed infringement of the rights of others vis-à-vis the recognition of any artistic qualities inherent in the work. At the very least, in light of *Karatas* and *Alinak* the Court ought, it is suggested, explain, in a depth that has been hitherto lacking, precisely *how* an artwork, even if controversial, can be said to *directly* – in the Millian sense – cause the harm with which it is alleged to have caused.<sup>805</sup>

Yet, the specific approach taken by the Court in *Karatas* and *Alinak* is something of a double-edged sword: offering both hope and trepidation with regard to the future protection of artistic expression. By 'distancing' the expression from the alleged harm by way of the recognition of the limited audience which will be exposed to the artwork and the therefore necessarily limited impact that the (artistic) expression will have with regards to the feared harm, the net result in *Karatas* and *Alinak*, and in ironic contrast with the blasphemy cases, is that the works have been protected precisely because of their supposed inability to contribute to (widespread, at least) public discourse. Such an approach, when looked at from such a perspective does little to suggest that the value of artistic expression, within the paradigm of freedom of expression more generally, is being appreciated.

Moreover, and in relation to the seeming irony outlined above, despite the recognition in *Karatas* and *Alinak* that specific artistic qualities ought to be acknowledged, there remains a sense – that was indeed later developed in *Vereinigung Bildender Künstler* – that the artwork, rather than being protected solely because of its inherent value as a work of art, was implicitly protected because of its proximity to more 'traditional' expression or, more broadly speaking, to 'political' expression. As we have seen with *Vereinigung Bildender Künstler*, and the Court's recognition that the painting offered a 'counter-attack' to

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<sup>805</sup> The Court will, it is suggested, have the opportunity to address this issue in the case of *Samodurov and Vasilovskaya v. Russia*. (At the time of writing elements of the case have been declared inadmissible. A final decision regarding the freedom of artistic is still waiting.)

criticism received by the artist in the past, so too in *Karatas* and *Alinak* can we see a certain, albeit implicit, ‘locating’ of the expression within more well-trodden ground. In particular, the reference to the expressions being an exclamation of deep distress in light of particular circumstances, suggests more of a recognition of the cognitive and rational side of expression than is necessarily associated with the artistic endeavour more specifically.

#### **4.4 Artistic expression’s precarious position within Article 10: A discussion**

That the restriction of controversial art was continually held not to have violated Article 10 in the Court’s fledgling jurisprudence concerning specifically artistic expression is demonstrative of the *prima facie* recognition that there is, within Article 10, an implicit hierarchy of expression, according to which artistic expression has been afforded a lesser degree of protection than other forms of expression.<sup>806</sup> Extrapolating a coherent rationale justifying the relatively low level of protection afforded to artistic expression is, however, an inherently vexatious task. For, as Leigh points out, the reasoning underpinning the Court’s assessment of whether the interference was prescribed by law, pursued a legitimate aim or was necessary in a democratic society is obscured by the application of a wide margin appreciation.<sup>807</sup> Nevertheless, an attempt must be made to distil from the Court’s case law a rationale explaining the precarious positioning of artistic expression within Article 10. In so doing the following discussion of the Court’s early case law concerning controversial art in the context of morals and religion will focus on some of the key criticisms to have emerged from the Court’s application of its margin of appreciation and its specific impact on artistic expression. The discussion will then move on to address the Court’s more recent case law in which the protection of morals and religious sensitivities did not form the basis of the legitimate aim pursued by the state. Whilst these cases are demonstrative of a facial shift towards the better protection of artistic expression the underlying reasoning employed by the Court has, nevertheless, left artistic expression remaining in an inherently precarious position within Article 10.

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<sup>806</sup> See, for instance, Foster, S. *Artistic Expression, Public Morality and Article 10 of the European Convention*, 171 JPN 620 (2007); Leigh, I. *Damned if they do, Damned if they don’t: the European Court of Human Rights and the Protection of Religion from Attack* 17 Res Publica 55 (2011); Lewis, T. *Human Earrings, Human Rights and Public Decency*, 1 Entertainment Law 50 (2002); Kearns (n 16)

<sup>807</sup> Leigh (n 806) at 56

It was recognised, in Chapter Three’s overview, that the margin of appreciation – that is to say, the degree of discretion afforded to the State in fulfilling its Convention obligations<sup>808</sup> – is variable, contracting or expanding depending on both the form of expression in question as well the limitation clause relied upon by the State in seeking to restrict a given expression under Article 10(2).<sup>809</sup> In particular, the developments made in the Court’s early jurisprudence of *Müller*, *Otto-Preminger-Institut* and *Wingrove* demonstrate the solidification of the Court’s recognition that, in cases concerning religion or morals, there exists the presumptive need to apply a wide margin of appreciation. In this regard, it is of interest that the language employed by the Court in defining the margin of appreciation’s scope developed from the ambiguity of a ‘certain’ margin of appreciation in *Müller* and *Otto-Preminger-Institut*, to that of an explicitly ‘wide’ margin of appreciation in the case of *Wingrove*.

Whether ‘certain’ or ‘wide’, key to appreciating the relatively low level of protection afforded to artistic expression under Article 10 is the recognition that the Court’s application of the margin of appreciation profoundly affects the degree of scrutiny with which it assesses any given interference with freedom of expression. Thus, as Mahoney asserts, it is the Court’s policy to, “give priority to the universality of the standard of freedom of expression laid down in Article 10 in regards to political and public-concern speech.”<sup>810</sup> The implication being that controversial artistic expression dealing with matters concerning religion and morals does not sufficiently contribute to – or, more pertinently, is not considered to be sufficiently valuable in light of – the European Court of Human Rights’ appreciation of the central values of Article 10.

Whilst such a position may in principle align with the protection-coverage distinction highlighted in the previous chapter, the Court’s failure to proffer a meaningful assessment of the state’s limitation of freedom of artistic expression in its early jurisprudence (vis-à-vis the application of wide margin of appreciation) necessarily means that the Court has overlooked the specific, arguably unique, value(s) that embody artistic expression’s contribution to the underlying values of Article 10. There is, it is argued, a failure on the part of the Court to engage adequately with the question of why artistic expression is, in

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<sup>808</sup> See, for instance, Barendt (n 27) at 44

<sup>809</sup> On the margin of appreciation’s scope being affected by both the expression’s form and the specific limitation clause relied upon by the State under Article 10(2) see, for example, Leigh (n 806) at 57

<sup>810</sup> Mahoney (n 381) at 379

fact, included within Article 10's coverage; the result being that the unique way in which artistic expression does contribute to the core values of Article 10 are overlooked and artistic expression's subsequent protection necessarily undermined.

As such, by self-imposing a limit on the depth with which it is confident in assessing the necessity of an interference with artistic expression, the Court cannot, in any given instance, sufficiently incorporate an appreciation of the essential questions pertaining to art's unique position in a democratic society when balancing the right to artistic expression against other societal interests under Article 10(2). Thus, with reference to the academic commentary pertaining to the pivotal aspects of the case law and its impact on specifically artistic expression, it will be demonstrated below that, through the application of the margin of appreciation has, as Kearns posits, acted, "in dereliction of its duty."<sup>811</sup> For in deferring to the state authorities' assessments of the purported necessity, in a democratic society, of the interferences with a given expression, the Court's supervision is necessarily limited to a tacit acceptance of the State's position. As such, and as demonstrated in the case law overview above, there was little in the way of meaningful examinations of whether the interference was either necessary (which is taken to imply the existence of a 'pressing social need' for the expression's restriction<sup>812</sup>), proportionate in pursuing the legitimate aim,<sup>813</sup> or that the reasons provided by the State are relevant and sufficient.<sup>814</sup> The Court's failure to do so has, as we shall see, had a profound impact on the freedom of artistic expression.

Thus, the *Müller* judgment has been the subject of considerable criticism for its unquestioning reliance on the position advanced by the state. Indeed, Fenwick and Phillipson describe the Court's adoption of such a degree of deference and the degree of reasoning that such deference entails as, "disingenuous."<sup>815</sup> Underlying Fenwick and Phillipson's concerns with the Court's application of the margin of appreciation in *Müller* was the impact that the doctrine had on the Court's ability to recognise that the Swiss courts were concerned only with whether the expression fell within the relevant legislation's definition of 'obscene' – which the authors go on to assert was, on the facts, undoubtedly

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<sup>811</sup> Kearns (n 16) at 26. See, also, Fenwick and Phillipson (n 396) at 421: "Whilst there is, theoretically, European 'supervision'...the extraordinary laxness of the proportionality reading in *Müller*, replicated in *Otto*, amounts in practice to the *virtual abnegation of this responsibility*." (emphasis added)

<sup>812</sup> See, for instance, *Lingens v. Austria*, 8 EHRR 407 (1981), para. 39

<sup>813</sup> See, for instance, *Lingens v. Austria*, 8 EHRR 407 (1981), para. 40

<sup>814</sup> See, for instance, *Lingens v. Austria*, 8 EHRR 407 (1981), para. 40

<sup>815</sup> Fenwick and Phillipson (n 396) at 58

the case – and not with whether there was a ‘pressing social need’ for restricting the paintings’ future exhibition.<sup>816</sup> Equating the Swiss court’s assessment that the paintings were obscene under the relevant Swiss law with the supposition that there was a ‘pressing social need’ for interfering with the expression demonstrates, as Fenwick and Phillipson proclaim, “an extraordinarily flawed mode of analysis,” in as much as it forestalls any attempt by the Court to address whether there was genuinely a ‘pressing social need’ or, more fundamentally still, whether the obscenity law itself was compatible with the right to freedom of expression.<sup>817</sup>

A related point is raised by Lewis in respect to the limited degree of reasoning employed in the Commission’s determination that the case of *S and G v. UK* was inadmissible. The case, it will be remembered, concerned the conviction of both the artist and gallery owner for the common law offence of outraging public decency following the exhibition of *Human Earrings* – a sculpture adorned with earrings made from freeze-dried, human foetuses. Whilst *Human Earrings* is clearly a shocking work of art, the facts of which are, as Kearns acknowledges, “gruesome,”<sup>818</sup> the extent to which the specific offence of outraging public decency may be seen to align with the state’s assertion of that its application pursued the legitimate aim of protecting morals within Article 10(2) is, for Lewis, questionable nonetheless.<sup>819</sup> Thus, underlying Lewis’s scepticism is the notion that the protection of morals does not form an inherent aspect of the offence of outraging public decency; the common law offence’s principal concern being that of protecting the public from shock, disgust and outrage.<sup>820</sup> Since, properly understood, the offence of outraging public decency concerned simply the protection of, *inter alia*, ‘shocking’ expression (and not the protection of *morals per se*), according to Lewis the *Handyside* dictum therefore ought to have been applied.<sup>821</sup> That the Commission could not, on account of the deference afforded to the national authorities under the application of a wide margin of appreciation,

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<sup>816</sup> Fenwick and Phillipson (n 396) at 58

<sup>817</sup> Fenwick and Phillipson (n 396) at 58

<sup>818</sup> Kearns (n 16) at 72

<sup>819</sup> Lewis (n 806) at 60-61

<sup>820</sup> Lewis (n 806) at 60-61. Moreover, Lewis argues that there is significance in the fact that the prosecution was brought under the common law of outraging public decency and not the Obscene Publications Act 1959. Whereas the outraging of public decency is an offence of strict liability, the OPA 1959 – with its emphasis on limiting, *inter alia*, expression capable of ‘depraving’ and ‘corrupting’ individuals – whilst lending itself more favourably to the notion of protecting morals within Article 10(2), contains a defence of artistic merit. The Court’s failure to investigate the genuine relationship between the offence and the legitimate aim of protecting morals was, as such, a tacit acceptance of the prosecution, as Lewis points out, having both its cake and eating it. On the implications of the prosecution’s strategy in *S and G* see also Kearns (n 16) at 33-36, 51-52, 72-74

<sup>821</sup> Lewis (n 806) at 61



adequately investigate this issue is a significant concern for the freedom of expression generally and artistic expression in particular.

Accordingly, given the breadth with which the legitimate aims of Article 10(2) have been construed, it has been noted that only very rarely has the Court found there to have been a violation of Article 10 on the basis that the interference did not, in fact, pursue a legitimate aim.<sup>822</sup> Yet the ease with which the state can stipulate that the interference pursued the legitimate aim of protecting morals, when coupled with the wide margin of appreciation and associated lack of scrutiny is of profound detriment to artistic expression. Thus, it is submitted that in light of the wide margin of appreciation, the methodology employed by the Court in accepting that the protection of moral and religious sensitivities constitutes a sound basis for the restriction of controversial artistic expression is unconvincing in its failure to appropriately recognise the value of artistic expression for the purposes of its Article 10 protection.

In light of its early case law concerning the interplay between artistic expression and morals or religion, Evans has surmised that the Court's approach is suggestive of a move away from the protection of an individual's right to freedom of artistic expression and is, instead, indicative of the Court's implicit acceptance of the state's role in protecting people from offensive expression.<sup>823</sup> Thus, in *Müller* the Court accepted that the application of the obscenity laws under which the prosecution was brought evidently pursued the objective of protecting public morals and that, furthermore, there was, "a natural link between [the] protection of morals and [the] protection of the rights of others."<sup>824</sup> Similarly, in the cases of *Otto-Preminger-Institut* and *Wingrove* the protection of the rights of others was considered to incorporate a right to respect for one's religious feelings<sup>825</sup> and a protection against the treatment of a religious subject in such a manner that outrages believers.<sup>826</sup> Yet the Court's summation that there exists a right to be protected from offence capable of restricting expression within the rubric of Article 10(2)'s 'rights of others' somewhat begs the question of whether the protection of religious and moral sensitivities are, in fact, suitable bases for curtailing particularly *artistic* expression.

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<sup>822</sup> Lewis (n 806) at 60

<sup>823</sup> Evans, M, *Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions*, in Cane, P., Evans, C. and Robinson, Z. (eds), *Law and Religion in Theoretical and Historical Context* (2008), p. 291

<sup>824</sup> *Müller*, *op cit*, para. 30

<sup>825</sup> *Otto-Preminger-Institut*, *op cit*, paras. 46-48

<sup>826</sup> *Wingrove*, *op cit*, paras. 45-51

On the question of the relationship between freedom of expression and the protection of morals, Nowlin

insists that, “the *only* moral question at stake in cases such as *Handyside*...should be the critical moral question, ‘why should the state be entitled to restrict a socially accepted civil right or freedom?’”<sup>827</sup> According to the quintessentially Millian position adopted in Nowlin’s thesis, such restrictions ought only be applied on the basis that the expression undermines others’ dignity and equality of autonomy.<sup>828</sup>

In highlighting this point, Nowlin cites favourably the Canadian case of *Butler*<sup>829</sup> and the rationale employed by the court in confirming the constitutionality of anti-obscenity legislation with regards to hardcore pornography.<sup>830</sup> Crucial to the court’s judgment in *Butler* was the emphasis placed on hardcore pornography’s potential to harm women, whether in terms of physical injury, degradation, exploitation, servility or subordination. In short, the potential of such harm was deemed to, “run against the principles of equality and dignity of all human beings.”<sup>831</sup> However, according to Nowlin’s thesis, the real significance of the *Butler* judgment lies in its recognition that the anti-obscenity legislation could only be considered constitutional to the extent that its ‘overriding objective’ was the prevention of harm to society and did not confer on the government the power to limit citizens’ rights to express themselves on the basis that the expression contravened, “a certain standard of public and sexual morality.”<sup>832</sup>

As such, under Dyzenhaus’ reading of *Butler*, whilst ‘obscenity’ and ‘offensiveness’ were indeed factors considered by the court, the constitutionality of Canada’s anti-obscenity law was rooted in the notion that the cause of offence stemmed from hardcore pornography’s capacity to harm the autonomy and equality of others.<sup>833</sup> In other words, the restriction on freedom of expression in *Butler* was grounded, not on an individual’s taste or sensitivities – what might be labelled ‘offence *simpliciter*’ – but on offence of a more fundamental nature, deriving from the expression’s capacity to cause harm.

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<sup>827</sup> Nowlin, C. *The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 24 Hum. Rts. Q. 264 (2002) at 285

<sup>828</sup> Nowlin (n 827) at 285

<sup>829</sup> *R. v. Butler* [1992] D.L.R. (4th) 449

<sup>830</sup> See, generally Nowlin (n 827) at 276-278

<sup>831</sup> *R. v. Butler*, *op cit*, p. 466

<sup>832</sup> Nowlin (n 827) at 277

<sup>833</sup> Dyzenhaus, D. *Obscenity and the Charter: Autonomy and Equality*, 1 Criminal Reports 367

Returning to the ECtHR, the requirement under Nowlin's thesis – namely that the protection of morality be understood along Millian lines with regards to the prevention of harm – may be evidenced in certain (albeit, non-freedom of expression) cases concerning sexual activity. Thus, Nowlin notes that in the case of *Laskey, Jaggard and Brown v. United Kingdom*<sup>834</sup> it was the severity of the injuries obtained through sadomasochistic practices and not considerations of the sexual morality of sadomasochism *per se* that was, in that instance, the cause of legal concern.<sup>835</sup> Similarly, in *A.D.T. v. The United Kingdom*<sup>836</sup> – concerning the applicant's conviction of gross indecency for engaging in homosexual group sex – the Court, “clearly implied that consensual, nonviolent sexual activities involving more than two participants were not inherently immoral.”<sup>837</sup>

Such instances may therefore be construed as confirming Nowlin's position that there is nothing immoral about sex *per se* such that, “an act can only be sexually immoral if it is an immoral act involving a sexual circumstance.”<sup>838</sup> Thus, in the case of *Laskey, Jaggard and Brown* the immorality stemmed, not from the sexual activity in and of itself or its deviation from common public standards of sexual practice but, rather, from some identifiable harm caused by that sexual activity. Put another way, in seeking to protect morals, the state needs to establish something more than potential offence arising from, for instance, the portrayal of sex *per se*. As Nowlin points out, if offence were to be derived simply from the depiction of sex *per se*, the protection of morality would, in essence, equate to the protection of feelings and thereby work to reinforce majoritarian susceptibilities.<sup>839</sup> Indeed, such a position would have the effect of giving credence to the ‘eccentric’<sup>840</sup> proposition put forward by Devlin, when he stated that:

There is...a general abhorrence of homosexuality. We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. *If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.*<sup>841</sup>

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<sup>834</sup> *Laskey, Jaggard and Brown v. United Kingdom*, (1997) 24 EHRR 39

<sup>835</sup> Nowlin (n 827) at 271; citing *Laskey, Jaggard and Brown v. United Kingdom*, paras. 20 and 47

<sup>836</sup> 31 EHRR 803 (2000)

<sup>837</sup> Nowlin (n 827) at 271 citing *A.D.T.*, para. 37

<sup>838</sup> Nowlin (n 827) at 271

<sup>839</sup> Nowlin (n 827) at 267-271

<sup>840</sup> Dworkin, R. *Taking Rights Seriously*, Harvard University Press (1977) at 242

<sup>841</sup> Devlin, P. *The Enforcement of Morals*, Oxford (1965) at 17-18 (emphasis added)

In order to avoid such a tyranny of the majority it is therefore crucial that the state, in seeking to protect morals, establishes something more than offence *simpliciter*. Under Nowlin's Millian-inspired account, this required 'something' is 'harm'. Moreover, whilst 'harm' may encompass offence, this offence must be specifically derived from the activity's undermining of others' dignity, equality or autonomy, as most clearly demonstrated in the case of *Butler*. Viewed in such a way, the protection of morals, according to Nowlin's 'constitutional meaning' of morals, can be seen to closely resemble the protection of the rights of others.

Accordingly, the emphasis placed by Nowlin on the need to make a principled distinction between protecting society's moral *status quo* and the protection of morality *vis* the protection of the actual *rights* of others is of acute significance when considering the Court's protection of artistic expression. Not only does it provide a means of engaging more thoroughly with its jurisprudence but it prompts us to focus our minds on the question of art's capacity to inflict harm of the sort capable of violating the rights of others. Rather than restricting the scope of artistic expression on the basis of protecting the majority's supposed sensitivities, the Court should, as Nowlin goes on to assert, "inquire further, [and ask] will [the] public display of the impugned paintings violate anyone's moral rights?"<sup>842</sup>

To reiterate, the only justifiable ground for the expression's restriction, under the Millian approach favoured by Nowlin, is that identifiable harm would ensue from the expression in question and not that in order to preserve some favoured notion of morality.<sup>843</sup> Turning to the question of specifically *artistic* expression, the Court's stance on the question of protecting morality in the case of *Müller* is particularly susceptible to criticism under Nowlin's persuasive thesis. The applicants in *Müller*, it will be remembered, were convicted under Switzerland's obscenity laws for the public exhibition of an artwork depicting sexual activities between men and animals. As we have seen, in failing to ask the more fundamental question of whether the obscenity law itself was compatible with the right to freedom of expression, a significant aspect of the Court's reasoning towards the decision that there had been no violation of Article 10 was the recognition, in lieu of the wide margin of appreciation afforded to the State, that the paintings depicted 'unnatural practices' and were 'liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity.' Fundamental to Nowlin's criticism of *Müller*, therefore, was the

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<sup>842</sup> Nowlin (n 827) at 280-281

<sup>843</sup> Nowlin (n 827) at 280

Court's unsubstantiated confirmation of the assertion that there exists, "a natural link between protection of morals and protection of the rights of others."<sup>844</sup>

Whilst there is indeed a relationship between the protection of morals and the protection of the rights of others under Nowlin's thesis, it is of fundamental importance to remember that, in order to justify its restriction, it needs to be established that the expression undermines, or at least has the potential to undermine, the specific (whether moral or Convention) rights of others. Moreover, in light of the *Handyside* dictum – in which Article 10's guarantees are said to apply to disturbing, shocking and offensive expression – in limiting the freedom of expression it ought not be enough to maintain, in and of itself, that individuals were offended by the material. Rather, it needs to be established that the offended person(s) were, for instance, denigrated or that the artwork undermined their dignity.<sup>845</sup> Accordingly, by failing to convincingly establish any such violation resulting from the applicants' displaying of the artwork, "the scope of artistic freedom under the Convention [was, in *Müller*] circumscribed by majoritarian proclivities and tastes."<sup>846</sup>

The basis of artistic expression's circumscription in favour of majoritarian moral values in *Müller* was developed upon in the cases *Otto-Preminger* and *Wingrove* and expanded to incorporate the protection of religious sensitivities. It will be remembered that, whereas in *Müller* there was said to be 'a natural link' between the protection of morals and the rights of others, the majority judgment in *Otto-Preminger-Institut* went further, asserting that:

the manner in which religious doctrines are opposed or denied is a matter which may engage the responsibility of the State...to ensure the peaceful enjoyment of the right [to, inter alia, freedom of belief] guaranteed under Article 9.<sup>847</sup>

The implication to be drawn from the Court's assertion, then, is that the showing of the film in *Otto-Preminger-Institut* had the capacity, in some way, to undermine the enjoyment of others' freedom of religion, such that the state was duty bound to restrict the applicant's freedom of expression in order to prevent a violation of Article 9.

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<sup>844</sup> *Müller*, para. 30

<sup>845</sup> Nowlin (n 827) at 280-281

<sup>846</sup> Nowlin (n 827) at 281

<sup>847</sup> *Otto-Preminger*, para. 47

For Barendt, the assertion that the film's showing could violate the right of religious believers to have their religious sensitivities respected under Article 9 is 'controversial'.<sup>848</sup> Indeed, for Leigh, the majority's assertion in *Otto-Preminger-Institut*, "lends an entirely different colour to how religious debate should be conducted [than is evident in the Court's Article 9 case law] by suggesting that there is [a] protective perimeter around religious beliefs where the state has a duty to police the conduct of third parties."<sup>849</sup> That the assertion made in *Otto-Preminger-Institut* was misguided is, for a number of reasons, clear. As Leigh asserts, the text of Article 9 guarantees neither the 'peaceful enjoyment' of one's religious convictions nor does it confer the right to 'respect' of one's beliefs.<sup>850</sup> Such a position is palpably clear in light of the *Choudhury* decision wherein, it will be recalled, it was concluded that the applicant's right to freedom of religion had not been violated by the state's failure to bring blasphemy proceedings following the publication of Salman Rushdie's *The Satanic Verses* on the basis that the offence of blasphemy under UK law applied only to the Christian faith. Put another way, Article 9 does not necessitate the protection of religion by way of blasphemy laws concerning the disparaging of religious doctrines. To imply that the state has a positive duty to protect religious sensitivities from purportedly offensive expression is, as such, misleading.

Furthermore, Leigh is sceptical of the suggestion, made by the Court in *Otto-Preminger-Institut*, that expression is, in fact, capable of undermining religious liberty noting that there is, "quite a high threshold to overcome before expression can be seen to impair one's ability to manifest one's religion."<sup>851</sup> That the violation of someone's ability to manifest their religion for the purposes of Article 9 requires that a particularly high threshold be met is evidenced, by Leigh, in the fact that there have been no instances in which, "verbal, written or artistic attacks alone on religion have been found...to violate Article 9."<sup>852</sup> Accordingly, there is no evidence from the case law that, without the existence of additional elements – such as coercive proselytising techniques<sup>853</sup> or physical attacks and intimidation<sup>854</sup> – expression is capable of violating Article 9. It is therefore significant that the Court's assessment in *Wingrove* centred solely on the 'rights of others' mantra of Article 10(2) and

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<sup>848</sup> Barendt (n 27) at 192

<sup>849</sup> Leigh (n 806) at 65

<sup>850</sup> Leigh (n 806) at 65

<sup>851</sup> Leigh (n 806) at 68

<sup>852</sup> Leigh (n 806) at 67

<sup>853</sup> *Kokkinakis v. Greece* (1994) 17 EHRR 397

<sup>854</sup> *97 members of the Gldani congregation of Jehovah's witnesses and 4 others v. Georgia*, Appl. No. 71156/01 (3 May 2007).

did not attempt to incorporate Article 9 in to its reasoning, a move that was to be welcomed in the concurring judgment of Judge Pettiti.<sup>855</sup>

Leigh's criticisms of the Court's approach to incorporating Article 9 within its reasoning notwithstanding, following from Nowlin's thesis, the implication to be drawn from the Court's assertion in *Otto-Preminger-Institut* regarding the manner in which an expression is made, is that the film was perceived to have had the capacity, in some way, to undermine the enjoyment of others' freedom of religion. Whereas the Court in *Müller* made no attempt to demonstrate precisely *how* the recognisably offensive artwork violated the rights of others beyond the causing of offence *simpliciter*, the majority in *Otto-Preminger-Institut* went further, suggesting that there existed, within the duties and responsibilities of Article 10:

an obligation to avoid as far as possible expressions that are *gratuitously* offensive to others *and thus an infringement of their rights*, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.<sup>856</sup>

A new category of offence – presumed to go beyond that of merely offence *simpliciter* – was thus established in *Otto-Preminger-Institut*, according to which an expression's restriction is justified on the basis that it is capable of violating the rights of others and is, as such, of no social utility. Were it therefore to be adequately established that gratuitously offensive expression is indeed capable of undermining the rights of others, the developments made by the Court in *Otto-Preminger* would, it is presumed, neatly align with the thesis submitted by Nowlin. However, the gratuitous offence doctrine is controversial, not least for the, "wide and vaguely defined powers," that it confers on the state to prescribe the manner in which expression is made.<sup>857</sup>

Moreover, it is suggested that the controversial nature of the rationale as employed by the Court in *Otto-Preminger-Institut*, and its specific impact on artistic expression, may be best considered in light of the observation, made in Chapter Three, that the Article 10 threshold question has, in general, elicited two responses by the Court. In this regard, it will be recalled that the Court, during the admissibility proceedings of certain cases, has on rare occasions refused to consider a given expression as even potentially falling within the ambit

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<sup>855</sup> *Wingrove*, Judge Pettiti (Concurring)

<sup>856</sup> *Otto-Preminger*, para. 49 (Emphasis added)

<sup>857</sup> Cram, I. *The Danish cartoons, offensive expression and democratic legitimacy* in Hare, I. & Weinstein, J. (eds) *Extreme Speech and Democracy*, OUP, 2009 at 327

of Article 10 either ‘internally’ (in the sense that a given act is not considered as being ‘expression’ for the purpose of Article 10) or ‘externally’ (with reference to Article 17 and on the grounds that the expression in question conflicted with, and undermined, Convention rights more generally).

Whilst the Court in *Otto-Preminger-Institut* accepted that the expression in question did indeed fall within the scope of Article 10’s coverage, the subsequent reasoning adopted by the majority of the Court in reaching the conclusion that the seizure and forfeiture of the film did not amount to a violation of Article 10 verges, implicitly, on the acceptance that the film’s expression was not expression for the purposes of Article 10. In so doing, the Court has stumbled upon the unsatisfactory position of recognising Article 10’s coverage of controversial art whilst simultaneously finding that such expression is not, in essence, ‘expression’ for the purposes of Article 10. That employing the term ‘gratuitous expression’ has led to the de facto exclusion of a category of expression from protection is particularly troublesome when applied to the unique nature within which art and artistic expression is seen to operate.

Turning to the dictionary, ‘gratuitous’ is defined as, ‘without any good ground or reason; not required or warranted by the circumstances of the case.’<sup>858</sup> Accordingly, with regards to offensive expression, Cram identifies two distinct interpretations of the term ‘gratuitous.’ Firstly, gratuitously offensive expression might refer to expression that is, “groundless, lacking an objective basis in fact or reason,” whilst, alternatively, expression might be considered gratuitous in that it, “involves some form of unnecessary or needless expression that offends members of the audience.”<sup>859</sup> Both interpretations have the potential to significantly impair the right to freedom of artistic expression and place its protection at a distinct disadvantage under Article 10.

For instance, Cram notes that in the case of *I.A.* the basis of the book’s censure seems to have been that the expression was ‘groundless’ or ‘unwarranted’, yet such a definition does not lend itself well to the fact that the expression was made in the context of a novel.<sup>860</sup> Thus, the ‘gratuitous’ nature of assertions made regarding Mohammad having sex with dead people and animals – the ‘abusive attack’ – was seen to be rooted in the lack of

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<sup>858</sup> Oxford English Dictionary

<sup>859</sup> Cram (n 857) at 325

<sup>860</sup> Cram (n 857) at 326



historical basis for the assertion. However, for Cram, that the expression was made in the form of a novel is of significance. In permitting the prosecution to ‘cherry-pick’ the most controversial and facially offensive elements of the work on the basis of the groundlessness of the assertions, the overall context in which the expression was made was overlooked.<sup>861</sup> As such, for Cram, ‘gratuitous offence’ offence ought best to be considered in terms of its needless cause of offence, such that, in the case of *I.A.* it was open to the author to choose less offensive terms, perhaps by employing the use of metaphor in order to allude to the point he was trying to establish.<sup>862</sup>

Yet such an understanding runs counter to the very essence of artistic expression and places it at a distinct disadvantage especially when compared with traditionally recognised political or public interest expression. Indeed, as Foster points out, in the case of *Jersild*<sup>863</sup> – in which the interference with the freedom of expression of a journalist who broadcast the openly racist views of the ‘Greenjackets’ group was held to be a violation of Article 10 – it was asserted that, in the context of political expression, individuals and the press have a discretion in choosing the methods that they wish to employ in formulating their expression.<sup>864</sup> Moreover, the Court recited the principle – asserted in *Oberschlick*<sup>865</sup> – that, “Article 10...protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.”<sup>866</sup>

However, as Trispiotis points out, with the introduction, in *Otto-Preminger-Institut*, of the notion of gratuitous offence came the Court’s recognition that the style (and not the content *per se*) may be a cause for the restriction of expression.<sup>867</sup> Such a recognition may go some way towards identifying a distinction between the case of *Giniewski v. France*<sup>868</sup> in which a violation of Article 10 was found, and the cases of *Otto-Preminger-Institut*, *Wingrove* and *I.A.* in which no such violation was found. In *Giniewski*, the applicant alleged that his Article 10 right had been breached by the French authorities’ imposition of a fine as punishment for the publication of an article written in a newspaper. The article maintained that, “Many Christians have acknowledged that scriptural anti-Judaism and the doctrine of

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<sup>861</sup> Cram (n 857) at 326

<sup>862</sup> Cram (n 857) at 326-327

<sup>863</sup> *Jersild v. Denmark* (1994) 19 EHRR 1.

<sup>864</sup> Foster (n 806) at 620; *Jersild*, para. 31

<sup>865</sup> *Oberschlick v. Austria* (1991) 19 EHRR 389, para. 57

<sup>866</sup> *Jersild*, para. 31.

<sup>867</sup> Trispiotis, I. *The duty to respect religious feelings: Insights from European Human Rights Law*, 19 Colum. J. Eur. L. 499 (2012-2013) at 528

<sup>868</sup> *Giniewski v. France* (2006) 45 EHRR 589

the ‘fulfilment’ of the Old Covenant in the New led to anti-Semitism and prepared the ground in which the idea and implementation of Auschwitz took seed.”<sup>869</sup> Not surprisingly, many Christians took offence at the assertion that Christianity, and in particular, the Roman Catholic Church, was in some way linked to the Holocaust. Indeed, the General Alliance Against Racism and for the Respect for the French and Christian Identity stressed that such statements amounted to “racially defamatory statements against the Christian community.”<sup>870</sup> That the offensive expression was made by an historian, in an historical treatise therefore played heavily on the Court’s mind in finding there to have been no violation, it being asserted that, “such views do not in themselves preclude the enjoyment of freedom of expression.”<sup>871</sup>

What therefore distinguishes *Giniewski* from the cases concerning the protection of the moral and religious sensitivities from controversial art is the style and manner with which such expression is conveyed. Yet, it remains doubtful that artistic expression, properly construed, is inherently capable of being offensive (be it gratuitous or otherwise) or blasphemous or of instilling the type of harm identified by Nowlin as being a prerequisite for restricting expression, that is to say the undermining of another’s dignity. Thus, for Kearns, the application of a wide margin of appreciation precludes the Court from engaging appropriately with the unique ontology of art in light of which, “a meta-standard of artistic and moral insight,” might be applied that is, “consonant with its supra-national foundational role.”<sup>872</sup>

Crucial to Kearns’ thesis, then, is the recognition that obscenity or blasphemy:

...[s]imply cannot inhere in art because art’s ontology and cultural distinctiveness require a contemplative engagement with it that negates...even the remotest possibility of literal harm: a harm that could arguably only occur in an art-absent context...or through audience ignorance of art.<sup>873</sup>

Yet, under a wide margin of appreciation, the Court is incapable of taking note of art’s distinctive qualities as a form of expression within its assessment of the proportionality of the State’s interference with the expression. Nonetheless, the Court’s assessment of proportionality may be criticised without specific reference to artistic expression. For

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<sup>869</sup> *Giniewski, op cit*, para 14

<sup>870</sup> *Giniewski, op cit*, para. 14

<sup>871</sup> *Giniewski, op cit*, paras. 51-52

<sup>872</sup> Kearns (n 16) at 26

<sup>873</sup> Kearns (n 16) at 155

instance, with regards to *Müller*, Warbrick notes that, “the result was that the application of the standards prevailing in a small part of Switzerland had an *erga omnes* effect of universal proportion,”<sup>874</sup> which cannot but be described as, “a grave interference with freedom of expression”<sup>875</sup> that does not instinctively feel proportionate. Similarly, in *Otto-Preminger-Institut* the lack of assessment as to the proportionality of the interference is exemplified in light of the efforts made by the film-house to limit the potential for offence by introducing an admission fee and age restriction – a point that was raised in the dissenting opinion.<sup>876</sup>

Nevertheless, the more pertinent and fundamental effect that the application of a wide margin of appreciation has on the protection of artistic expression lies in it disabling the Court from recognising that, as Kearns asserts, “any perceived ‘transgressions’ of acceptable moral boundaries by [art] in a social context are understood to be taking place within the artistic order, ie within art’s normal internal canons of operation.”<sup>877</sup> Thus, the very fact that the expression is made in the form of art necessitates a unique judicial approach in which it is appreciated that, “art can incite no ‘real life’ action other than the reader’s psychic reaction to it in that aestheticised psychic personal environment.”<sup>878</sup> As such, in limiting the degree of scrutiny available to the Court in making its assessment, the margin of appreciation necessitates the failure of the Court to recognise what can be drawn from artworks, be they ‘offensive’ or otherwise, and their contribution to what may loosely be defined as public discourse. Thus, in *S and G*, for instance, the implicitly wide margin of appreciation necessarily precluded the Court from incorporating, as Kearns highlights, the artist’s ‘message’ that, “life is now so cheap that aborted fetuses can even be used as mere ornamentation in the superficial world of postmodernism.”<sup>879</sup> Accordingly, whilst the social utility of controversial art is difficult to comprehend, when understood in the context in which it was intended to be understood, it nevertheless plays a valuable role in a democratic society. It is unfortunate, therefore, that through the application of a wide margin of appreciation the Court has failed to recognise the extent to which art and artistic

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<sup>874</sup> Warbrick, C. *Federalism and Free Speech – Accommodating Community Standards: the American Constitution and the European Convention on Human Rights*, in I Loveland (ed), *Importing the First Amendment: Freedom of Expression in American, English and European Law* (1998) at 187

<sup>875</sup> Fenwick and Phillipson (n 396) at 59

<sup>876</sup> *Otto-Preminger-Institut*, Dissenting Opinion of Judges Palm, Pekkanen and Makarczyk, paras. 6-11

<sup>877</sup> Kearns (n 16) at 162

<sup>878</sup> Kearns (n 619) at 656

<sup>879</sup> Kearns (n 619) at 657

expression contribute to the values underpinning Article 10, albeit in a distinctly unique manner.

Writing shortly after the Court's finding of a violation of Article 10 in the *Vereinigung Blinder Künstler* case, Sharland suggested that there may be emerging in the Court's jurisprudence a "more sophisticated analysis," before acknowledging that, "[i]t is too early to say whether th[is] recent development herald[s] a significant shift in the Court's approach [to the protection of artistic expression]."<sup>880</sup> Yet, the reasoning employed by the Court in cases in which a violation of Article 10 is found – such as *Vereinigung Blinder Künstler* and *Karatas* – do little more than confirm, as Kearns suggests, "the Court's informal but definitive decision to prize political expression as the expression most in need of protecting."<sup>881</sup> Similarly, under Foster's assessment, the decision in *Vereinigung Blinder Künstler* simply, "reaffirms the value of political speech and the right to oppose and attack political figures...[and] does little to resolve the recent dilemmas about whether free speech includes the right to cause shock and offence."<sup>882</sup>

Accordingly, such an approach – in which the more that artistic expression is seen to display political connotations, the greater its protection vis-à-vis a narrowing of the margin of appreciation – still fails to give credence to the unique ontology of art and the recognition that the form in which art's expression is made of considerable significance and underlines the special relationship that art plays in a democratic society. Moreover, as Kearns submits, "to protect artistic expression primarily because of its political content creates conceptual difficulties because 'art' is then equated with 'opinion'."<sup>883</sup> Yet, as we discovered in Chapter Two of this thesis, the relationship between art and the conveyance of opinions is a complicated one and not well-suited to incorporation within the traditional political expression paradigm. It is for this reason, then, that artistic expression ought to be considered on its own terms, without reference to its political nature. As Kearns surmises, in order to achieve a more consistent and principled jurisprudence concerning artistic expression, "[t]he Court must register and understand art's peculiar societal recognition and status, and concomitant singular methods of operation, in order to render it true justice when it enters the legal arena."<sup>884</sup>

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<sup>880</sup> Sharland, A. *Focus on Article 10 of the ECHR*, [2009] J. R. 59 at 72

<sup>881</sup> Kearns (n 16) at 173

<sup>882</sup> Foster (n 806) at 624

<sup>883</sup> Kearns (n 16) at 173

<sup>884</sup> Kearns (n 16) at 174

## 4.5 **CONCLUSION**

It has been suggested over the course of the preceding discussion that artistic expression within the Court has found increasing favour, predominantly in terms of an increasing willingness on the part of the majorities within the Court to accept, and apply the unique qualities pertaining to art when considering the proportionality of a given State interference. From the early cases concerning public morality in which artistic qualities were given no credence, towards the defamation and prevention of disorder cases one begins to see a certain willingness to accept that the distinct nature of art as expression requires a particularly distinct approach in resolving the particular issues that have arisen.

Yet there still remains a lack of real cohesiveness in the Court's approach to artistic expression that, whilst seeming to advance the artistic cause, can simultaneously be considered to be reinforcing the status quo, through ingrained perceptions of the requisite qualities of the expression to be entitled to protection under Article 10. To some extent this ambiguity may be traced back to the early cases of *Müller*, *Otto-Preminger* and *Wingrove* and the development of the gratuitous offence doctrine that worked, at least in a de facto sense, to preclude challenging art from protection under Article 10. As such it is perhaps of little surprise that, despite the Court's increasing reference to the artistic qualities of an artwork the spectre of the notion of a protected artwork's relationship with 'political' expression has remained. Indeed, it is this juxtaposition that goes some way to explaining the almost paradoxical positions that have emerged in light of cases like *Vereinigung Bildender Künstler* and *Karatas/Alinak*, again bringing in to focus the lack of genuine cohesion with which artistic expression is dealt with by the Court under Article 10.

Resolving the largely dissatisfactory treatment of artistic expression within Article 10 requires, as Rosenberg suggests, that the Court refrains from employing a wide margin of appreciation when considering instances concerning art.<sup>885</sup> Indeed, the presumption underlying the Court's reasoning in applying a wide margin of appreciation – ie. that a lack of consensus demands deference to the state authority's reasoning – is, itself, unsound and gives rise to contradictions in the Court's jurisprudence. In this regard, Cram stresses the importance of the need for methodological clarity when looking for consensus, noting that

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<sup>885</sup> Rosenberg, M. Drawing outside the lines: the European Court of Human Rights' interpretative limitation of freedom of artistic expression and the role of religion, 19 Sw. J. Int'l L. 207 (2012) at 222-225

in the *Handyside* case the lack of consensus was simply asserted, whilst in *Müller*<sup>886</sup> the Court took, on trust, the Swiss authorities' claims that the people of a particular area were particularly sensitive to the sexually explicit artwork concerned.<sup>887</sup> Moreover, as Leigh points out, the presumption evident in cases such as *Müller*, "do[es] not explain...why on some questions (the growing recognition of gay rights being the outstanding modern example) more morally conservative states have not been permitted to invoke the margin of appreciation while on matters of religious expression this discretion remains largely untouched."<sup>888</sup>

Accordingly, refraining from implementing a wide margin of appreciation would proffer artistic expression greater equality of protection by enabling the Court to critically assess whether the legitimate aim being pursued was, in actuality, grounded in a law that was itself consonant with the right to freedom of expression.<sup>889</sup> More fundamentally still, removing the wide margin of appreciation would allow for the inclusion of explicit reference to artistic expression's value as a *sui generis* form of expression within an assessment of the necessity of the interference in a democratic society, according to which the extent to which (and manner in which) artistic expression's alignment with the values of Article 10 could begin to emerge.

With the case of *Samodurov and Vasilovskaya v. Russia*, which concerns a controversial art exhibition with religion as its theme, still to be decided the Court has the opportunity of squaring the circle it has, perhaps unwittingly, found itself in. By applying more rigorously the principles that have begun to develop through *Vereinigung Bildender Künstler, Karatas*, and *Alinak* the Court has the chance to secure the protection of artistic expression wholly within the realm of art and the artistic endeavour without any need, either implicitly or explicitly, rely on the proximity of the artwork's perceived ability to contribute to political discourse as traditionally understood. Until then, it is perhaps unfortunate that the drafting process culminating in Article 10 took the turns that it did.

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<sup>886</sup> *Müller and others v. Switzerland* (1991) 13 EHRR 212

<sup>887</sup> Cram (n 857) at 318

<sup>888</sup> Leigh (n 806) at 57

<sup>889</sup> Rosenberg (n 885) at 222-223 (Noting that the Court would, for instance, be able to recognise that the UK's blasphemy laws in *Wingrove* were, themselves, not consonant with freedom of expression guarantees.)

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## THESIS CONCLUSIONS

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Inquiring in to the law pertaining to the freedom of artistic expression under the European Convention on Human Rights is an inherently vexatious challenge, not least because of Article 10's silence on the issue of what, exactly, constitutes as 'expression' for the purposes of Article 10. Whilst earlier drafts of Article 10 made specific reference to the inclusion of artistic expression the final rubric explicated the right to freedom of expression simply in terms of the right to receive and impart 'information' and 'ideas'.

Accordingly, the thesis' first challenge was to confirm that artistic expression, broadly construed, could, at the level of abstraction, be regarded in such terms. In this regard the overview provided in Chapters One and Two sought to outline and, to a certain extent, synthesise the academic thought concerning the two distinct fields of freedom of expression and the theory of art. In so doing it was maintained that, whilst the conveyance of 'ideas' is not a necessary precondition of art – those ascribing to the formalist school of thought would, for instance insist that the value of art lies purely in its internal, formal qualities – it nevertheless remained possible for art to do so. Moreover, it was noted that the way in which art is considered to convey ideas is quite distinct, with the expression containing both cognitive and non-cognitive aspects. Disentwining these two interrelated and, to some extent, interdependent aspects of art's expression is, as such, conceptually difficult: indeed, with regards to the Kantian notions of beauty and the sublime, it is this very relationship in which the value of art is bestowed.

The extent to which the *sui generis* nature of artistic expression is recognised is therefore of particular significance in the task of locating artistic expression within the well-established discourse pertaining to the right to freedom of expression more generally. For instance, locating artistic expression within the distinction made by Mill between 'discussion' and 'positive instigation' is largely dependent upon one's understanding of art's capacity to contribute to a 'collision of adverse opinions' in the pursuit of truth. Similarly, under the Meiklejohnian defence of freedom of expression, artistic expression may only find protection to the extent that it may be considered to advance the democratic process. Whilst Meiklejohn himself insisted that the arts were required in order to ensure a citizenry with the requisite intelligence and sensibility to make informed, political choices,

such a rationale does little, in and of itself, to guarantee freedom of artistic expression in actual cases. Instead, in building on the argument from democracy provided by Meiklejohn, the thesis proffered by Weinstein may be considered as implicitly informing the European Court of Human Rights' approach to the question of artistic expression. Accordingly, and sharing certain similarities with the Millian approach, it is the extent to which artistic expression is considered to contribute to public discourse that is of fundamental concern.

That the European Court of Human Rights can be seen to have adopted a quasi-Weinsteinian approach to the protection of freedom of expression in general, and freedom of artistic expression in particular – according to which emphasis is placed on the expression's contribution to public discourse – was evinced in Chapter Three's discussion of the categorisation of expression. There it was established that there is a sound theoretical basis for the categorisation of expression and the variability with which those categories may be protected. As such, by focusing predominantly on the thesis provided by Schauer, in conjunction with those of Blocher and Sunstein, it was maintained that a distinction need be recognised between issues concerning the coverage of the right to freedom of expression and the protection subsequently afforded to it. In so doing, the value attributed to a given expression is of fundamental import.

According to Schauer's thesis, therefore, the determination of the right to freedom of expression's scope and the level of protection to be afforded to a given expression within its scope is largely to be based on the extent to which the underlying value of the expression is seen to align with or advance the value(s) inherent in the right's constituting document. Whilst there are a few cases in which, at the admissibility stages, the expression in question was deemed to not be *covered* by the guarantees of Article 10 it was noted that the overwhelming majority of the European Court of Human Rights' case law concerns issues pertaining to the, to use Schauer's terminology, *protection* of the right to freedom of expression. Thus, by assessing a sample of the European Court of Human Rights' case law concerning political and commercial expression in light of the exposition of Schauer's thesis regarding the coverage-protection distinction it was hoped that a greater appreciation of the core values underpinning Article 10 would emerge from which to base Chapter Four's analysis of the European Court of Human Rights artistic expression jurisprudence.

In this regard it was noted that there exists an inherent, though in some sense implicit, hierarchy of expression according to which political expression was awarded with a



privileged status of protection. Moreover, it was seen that the privileged status of political expression was achieved through the European Court of Human Rights' application of the margin of appreciation. Accordingly, in cases concerning political expression the European Court of Human Rights tends to narrow the national authorities margin of appreciation so as to both restrict the extent to which the State may limit freedom of expression and proffer the European Court of Human Rights with a greater scope with which to scrutinise the State's actions.

On the other hand, in cases concerning 'pure' commercial expression the margin of appreciation afforded to national authorities is, generally, wider such that the vigour with which the European Court of Human Rights may assess the States interference with the applicant's freedom of expression is necessarily reduced. The significance of the margin of appreciation in the determination of the *de facto* level of protection to be afforded to a given act of expression is brought in to sharp relief when one considers the hybrid cases in which there are elements of both commercial expression and political (or public interest) expression. Thus, in cases where it could be established that the expression in question contained a sufficient degree of 'public-interestedness', such that it was perceived to contribute to public discourse, the margin of appreciation was narrowed, therefore enabling a greater scrutiny on the part of the European Court of Human Rights.

Accordingly, in light of Weinstein's thesis concerning the underlying value of freedom of expression to be a contribution to public discourse and the notion put forward by Schauer that definition is parasitic on justification, Chapter Three can be seen to demonstrate the view that, under the non-differentiated rubric of Article 10, an expression's perceived capacity to contribute to public discourse is crucial in ensuring a *de facto* robust level of protection. From this premise, the extent to which the European Court of Human Rights can be seen to demonstrate an appreciation of the *sui generis* nature of artistic expression within the broader context of freedom of expression and the unique way in which art is perceived to be socially valuable – a notion that, from the Court's case law, is largely entwined with 'ideas and information' that contribute to some form of public discourse – would therefore prove determinative in Chapter Four's analysis of the European Court of Human Rights artistic expression jurisprudence.

In opening Chapter Four's case law analysis with an overview of the infamous *Handyside* case it was noted that the guarantees enshrined in Article 10 are said to apply to shocking,

offensive and disturbing expression. Such a mantra ought, on its face, to provide ample protection for artistic expression, given its almost inherent tendency to challenge and provoke. Yet, with the application of a wide margin of appreciation in the sphere of religion and morals came a certain obscuring in the European Court of Human Rights' reasoning that tended towards a *de facto* lower level of protection being afforded to artistic expression.

Accordingly, in the case of *Otto-Preminger-Institut*, for example, the national authorities were afforded a wide margin of appreciation owing to religious nature of the film in question. The width of the margin of appreciation thus worked, it was maintained in Chapter Four, to obfuscate the European Court of Human Rights assessment of the necessity of the film's seizure and forfeiture. Thus, despite having recognised in the earlier case of *Müller* that artistic expression, "contribute[s] to the exchange of ideas and opinions which is essential for a democratic society", by attributing the national authorities with a wide margin of appreciation the European Court of Human Rights ceded any opportunity to engage in an assessment of *how* artistic expression may be said to make its contribution to the exchange of ideas. Instead, a new doctrine – that of gratuitous offence – was established, according to which the offence emanating from the film's very existence was deemed so great as to be capable of undermining the rights of others and, as such, was regarded as being incapable of contributing to public discourse.

The early cases concerning artistic expression thus confirmed the conclusion reached in Chapter Three that contribution to public discourse is of fundamental import for the purposes of Article 10. Moreover, through the application of a wide margin of appreciation in cases concerning religion and morals – subject matter often drawn upon by artists in their works – the European Court of Human Rights failed to actively engage in determining the precise nature of artistic expression within the confines of the freedom of expression discourse more generally.

However, there has, since the early triumvirate of cases of *Müller*, *Otto-Preminger-Institut*, and *Wingrove*, been a certain liberalisation evident in the reasoning employed by the European Court of Human Rights when faced with matters concerning the freedom of artistic expression. Indeed, that *I.A. v. Turkey* – a case also concerning artistic expression and religious offence – was decided by the slimmest of majorities is perhaps evidence of

such a liberalisation. Moreover, the European Court of Human Rights has, since the early triumvirate of cases, held there to have been violations in the context of artistic expression. However, such findings are necessitated on the expression being of a sufficiently *prima facie* ‘political’ nature. Thus, in *Vereinigung Bildender Künstler v. Austria*, the collage depicting the aggrieved politician was considered in terms of the artist offering a ‘counter-attack’, there having been something of an ongoing dispute between the artist and the political party to which the politician in question belonged. Similarly, it was noted that, given the political context against which the poetry in the case of *Karatas v. Turkey* rested, despite the aggressive tone of the expression and the facial call to arms a violation of Article 10 was found.

Inherent in such findings was the narrowing of the national authorities’ margin of appreciation thereby enabling a greater scrutiny on the part of the European Court of Human Rights. Whereas in the early cases concerning the protection of morals the European Court of Human Rights could not, by necessity of the State’s wide margin of appreciation, engage in an examination of the precise nature of artistic expression; by narrowing the margin of appreciation in cases such as *Karatas* and *Vereinigung Bildender Künstler* the European Court of Human Rights was able to recognise some of the distinctive qualities pertaining to artistic expression. Accordingly, in *Karatas*, the artistic nature of the expression – with its use of such techniques as hyperbole and metaphor – led the European Court of Human Rights to surmise that the expression was, “less a call to an uprising than an expression of deep distress in the face of a difficult political situation.”

In so doing, and in addition to recognising the distinct way in which artistic expression can be said to contribute, in the Weinsteinian sense, to public discourse, the European Court of Human Rights can be seen to be incorporating the distinction made by Mill between ‘discussion’ and ‘positive instigation’. By recognising the way in which artistic expression operates within the freedom of expression paradigm, the European Court of Human Rights thus looked beyond the expression’s facial meaning – which, if taken literally might be said to amount to a ‘positive instigation’ – and towards its ability to contribute to an exchange of ideas necessary to achieve what Mill would describe as a progressive, democratic society.

However, that such an engagement with the conceptual capacity of artistic expression to contribute to public discourse is dependent upon the European Court of Human Rights

initial determination of the expression being facially sufficiently political remains of some concern. Accordingly, whilst the European Court of Human Rights' calibration of the margin of appreciation is not based on the expression being categorised as artistic expression *per se*, that a wide margin of appreciation is conferred on national authorities in the pursuing the protection of the rights of others vis-à-vis the protection of morals and religious sensitivities creates a de facto widening of the margin of appreciation with regards to artistic expression precisely because religion and morals inform much of the artists' work.

It is therefore suggested that, had Article 10 retained the explicit inclusion of artistic expression within its rubric, a more concrete protection of artistic expression might have ensued, according to which an engagement with the unique nature of art as a form of expression could more readily be availed by the European Court of Human Rights irrespective of the limitation clause pursued by the national authorities. Whilst artistic expression's express inclusion within the rubric of Article 10 would not, according to the thesis advanced by Schauer, *guarantee* its protection it would, nevertheless have solidified artistic expression's location within the freedom of expression paradigm and confirm, more directly than is currently the case, the value of artistic expression as a *sui generis* category of expression.

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